VOLUME III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 19[illegible]

No. [illegible]

RUNNING INDEX OF VOLUME III.

PAGE.

PROOFS of the following defendants, namely, Messrs.

RITCH.....

BULKLEY.....

and VAUGHAN.....

and of the following Colleges and Hospitals, namely,

CORNELL UNIVERSITY.....

DARTMOUTH COLLEGE.....

MARIETTA COLLEGE.....

YALE COLLEGE.....

COLUMBIA COLLEGE.....

WESLEYAN UNIVERSITY.....

ST. LUKE'S HOSPITAL.....

MANHATTAN EYE & EAR HOSPITAL.....

MT. SINAI " .....

PRESBYTERIAN " .....

WOMAN'S " .....

are upon pages 1 to 577 inclusive herein.

The proofs of

HAMILTON COLLEGE.....

AMHERST CGLLEGE.....

WILLIAMS COLLEGE.....

UNION THEOLOGICAL SEMINARY.....

UNIVERSITY OF ROCHESTER.....

NORTHWESTERN UNIVERSITY.....

BOWDOIN COLLEGE.....

ADELBERT COLLEGE.....

LAFAYETTE COLLEGE.....

begin at page 578 herein, and continue to the end of this volume.

Depositions.

	PAGE.
James L. Bishop:	
Direct	540
Cross	546
Re-direct	550–553
Re-cross	552–555
C. N. Bovee, Jr.:	
Direct	410
Cross	418
John Prentiss Browning:	
Notice of Taking Deposition	270
Stipulation	272
Direct	274
Cross	285
Re-direct	351
Re-cross	355
Certificate	358
Deposition introduced in Evidence	371
Thomas Daly:	
Direct	2
Charles H. Edgar:	
Direct	448
Cross	453
Re-direct	454
Edward M. Grout:	
Direct	361
Objection of Mr. Bishop in certain defendants	372
Cross	372

Hon. Alton B. Parker:	PAGE.
Notice of taking Deposition	439–458
Direct	440
Certificate of T. Newcomb	444
Deposition introduced in Evidence	438
Objection of Mr. Blaikie	446
Proof of Service of Notice	456
Order for Cross-examination of Alton B. Parker	559
Cross	561
Redirect	573
John B. Reynolds:	
Direct	5-67
Decision on Motion to punish for Contempt	20
Cross	72
Redirect	117
Recross	209
Redirect	233
Recalled, Redirect	446
Recross	
Recalled, Recross	460
Redirect	464–484
Recalled, Recross	504
Redirect	508
Recross	528

Defendants' Exhibits.

Judgment Roll, Amherst *vs.* Ritch, to the decision of the Court of Appeals.	
Introduced in evidence	3
Printing dispensed with by order of June 18, 1901, printed in Appendix. Submitted in separate volume, Case on Appeal, Amherst *v.* Ritch.	
Record of Appeal to General Term, Amherst *v.* Ritch.	
Introduced, Ex. 1, November 30, 1900	2

	PAGE.
PRINTING DISPENSED WITH, by above order. Submitted in said Case on Appeal.	
BRIEF on Appeal to General Term.	
Introduced, Exh. 4, Dec. 27, 1901	16
Printed in Separate Volume of BRIEFS, &c.	1—196
OPINION of General Term.	
Introduced Exh. 3, May 15, 1902	431
Is in Vol. IV	54—59
RECORD OF APPEAL TO COURT OF APPEALS.	
Introduced	2
PRINTING DISPENSED WITH. Submitted in said Case on Appeal.	
BRIEFS on Appeal to Court of Appeals.	
Introduced, Exhs. 1 and 2, Dec. 27, 1900	16
Printed in separate volume of Briefs, &c.	197—388
REMITTITUR of Court of Appeals.	
Introduced	3
Printed, Vol. IV	164a
OPINION, Court of Appeals.	
Introduced	460
Printed, Vol. IV	70—112
PAPERS ON MOTION TO AMEND REMITTITUR, &c.	
Introduced	4
Printed, Vol. IV	113—142
Affidavit of Wm. Blaikie, Jan. 28, 1897.	115
Order to show Cause thereon	113
Affidavit of Wm. Blaikie, Feb. 17, 1897.	130
Notice of further Motion	123

	PAGE.
BRIEF ON THESE MOTIONS.	
Introduced, Ex. 3, Dec. 27, 1900.....	16
Printed in separate volumes of Briefs, &c.	
DECISION of Court of Appeals on these Motions.	
Introduced	4
Printed, Vol. IV.....	142a
ORDER making Judgment of Court of Appeals the Judgment of the Supreme Court.	
Introduced, Exh. 3, Nov. 30, 1900.....	3
Printed, Vol. IV.....	165—166
REFEREE'S REPORT.	
Introduced	3
Printed, Vol. IV.....	143-159
EXCEPTION to Referee's Report.	
Introduced	3
Printed, Vol. IV.....	160—164
FINAL JUDGMENT.	
Introduced.....	4
Printed, Vol. IV.....	167—182
FINAL JUDGMENT, as proposed.	
Introduced	584
Printed, Vol. IV	752
COMPLAINT, REYNOLDS v. RITCH.	
Introduced, Exh. 3, Feb. 14, 1901.....	241
Printed in Vol. IV.....	695
LETTER, JOHN B. REYNOLDS TO WOODLAWN CEMETERY.	
Introduced, Exh. 1, May 15, 1902.....	449
Printed	449
LETTER, WM. BLAIKIE TO C. B KNEVALS.	
Introduced	452
Printed	452

DEFENDANTS' EXHIBITS FOR IDENTIFICATION.

	PAGE.
Nos. 1–5. Jan. 3, 1901, letters to Mrs. Fayerweather	55
Nos. 4–14. Jan 8, 1901, letters to Mrs. Fayerweather	60
No. 7. May 15, 1902	446

COMPLAINANTS' EXHIBITS.

SUBPŒNA to John B. Reynolds.
Introduced, Exh. 1, Nov. 30, 1900 14
Not printed.

POWER OF ATTORNEY, Lucy Fayerweather to John B. Reynolds.
Introduced, Exh. 1, Feb. 15, 1901 226
Printed, Vol. IV 279

EXHIBIT OF WRITING by Edward M. Grout.
Introduced, Exh. 1, May 8, 1901 386
Not printed.

LETTER, John B. Reynolds to Wm. C. Wallace.
Introduced, Exh, 1, May 19, 1902 500
Printed 501

INSTRUMENT OF GIFTS to Mrs. Fayerweather *et al.*
Introduced, Exh. 1, May 21, 1902 506
Printed 506

LETTER, Wm. C. Wallace to John B. Reynolds.
Introduced, Exh. 2, May 21, 1902 529
Printed 529

LETTER, Wm. C. Wallace to John B. Reynolds.
Introduced, Exh. 4, May 21, 1902 531
Printed 531

REPORT of Fayerweather Vault.
Introduced, Exh. 3, May 2, 1902 529
Printed 529

Complainants' Exhibits for Identification.

	PAGE.
No. 2, Feb. 5, 1901.....	228
No. 3, " "	244

Alphabetical List of Exhibits.

			Introduced.	Printed.	PAGE.
Amherst v. Ritch;	Brief at	General Term ..	16	In separate Book of Briefs, etc.	1.
" "	"	" Court of Appeals	16	In same	p. 200.
" "	"	" Motion to Amend...	16	" "	p. 443.
" "	Case on Appeal,	Gen. Term.....	2	Case. } In Separate Volume.	
" "	Case on Appeal,	Ct. of Appeals...	2	Case. }	
" "	Decision,	Special Term.....	2	Vol. I, p. 63.	
" "	Decision,	General Term.....	2	Case on Appeal.	
" "	Decision (Remittitur)	Ct. of Appeals.....	3	Vol. IV, p. 164a.	
" "	Decision,	Ct. of Appeals, Motion to Amend..... .	4	Vol. IV, pages 113–142.	
" "	Exceptions to	Special Term Decision.....	3	Vol. IV, p. 10-14.	
" "	Exceptions to	Referee's Report	3	Vol. IV, pp. 160–164.	
" "	Judgment,	Special Term (Truax)	3	Vol. I, p. 66.	
" "	Judgment,	General Term.....	3	Case on Appeal.	
" "	Final Judgment,	Special Term (Pryor)...	4	Vol. IV, p. 167.	

		Introduced.	Printed. PAGE.
AMHERST *v.* RITCH;	FINAL JUDGMENT, as proposed.....	584	Vol. IV, p. 752.
" "	JUDGMENT ROLL,		
" "	Special Term....	3	Case on Appeal.
	MOTION PAPERS to amend Remittitur, &c.....	4	Vol. IV, p. 113.
" "	OPINION of General Term.....	431	Vol. IV, p. 54.
" "	OPINION of Ct. of Appeals.....	460	Vol. IV, p. 70.
	ORDER on Remittitur, Special Term.	3	Vol. IV, p. 165.
" "	REFEREE'S REPORT.....	3	Vol. IV, p. 143.
" "	REMITTITUR, Ct. of Appeals.....	3	Vol. IV, p. 164a.
LETTER, Wm. Blaikie to C. B. Knevals.....		452	452
LETTER, J. B. Reynolds to Wm. C. Wallace		500	501
LETTER, J. B. Reynolds to Woodlawn Cemetery.....		449	449
LETTER, Wm. C. Wallace to J. B. Reynolds		529	529
LETTERS, Wm. C. Wallace to J. B. Reynolds.....		531	531
POWER OF ATTORNEY, LUCY FAYERWEATHER TO J. B. REYNOLDS...		203	Vol. IV, p. 279.
Reynolds *v.* Ritch, COMPLAINT.....		241	Vol. IV. 695.
REPORT OF FAYERWEATHER VAULT.		529	529
Subpœna, J. B. Reynolds.....		14	...
Writing E. M. GROUT.....		386	...

INDEX

TO

PROOFS OF DEFENDANTS TRUSTEES OF HAMILTON COLLEGE; Trustees of AMHERST College; President and Trustees of WILLIAMS College; The UNION THEOLOGICAL SEMINARY; The University of ROCHESTER; NORTHWESTERN University; The President and Trustees of BOWDOIN College; ADELBERT College of the Western Reserve University, and LAFAYETTE College.

TESTIMONY.

	PAGE.
Daniel O'Connell:	
Direct	579
Peter Heinlein:	
Direct	585

EXHIBITS ON BEHALF OF THE TRUSTEES OF HAMILTON COLLEGE.

"EXCEPTIONS to the decision of Justice Truax at Special Term, Supreme Court, in the case of the Trustees of Amherst College v. Ritch":	
Introduced	579
Printed "case on appeal"	910–964
"List of Papers in Printed Case on Appeal delivered to Examiner":	
Referred to	579
Printed	595
"CASE ON APPEAL to General Term":	
Introduced	580
Printed "case on appeal"	1–1055
"CASE ON APPEAL to COURT OF APPEALS":	
Introduced	581

	PAGE.
SUBMITTED AS A SEPARATE VOLUME, pursuant to order of Judge Lacombe, dated May 15th, 1899.....	594
Said order of Judge Lacombe is printed at page 18.	
"REMITTITUR from the Court of Appeals":	
Introduced.....	581
Printed Vol. IV.....	p. 164a
"ORDER MAKING THE JUDGMENT of the Court of Appeals the Judgment of the SUPREME Court":	
Introduced.....	582
Printed Vol. IV.....	165–166
"Exhibit 4. REFEREE'S REPORT; Exceptions to Referee's Report: Final Judgment":	
Introduced.....	4
"REFEREE'S REPORT":	
Printed Vol IV.....	143–159
"EXCEPTIONS TO Referee's Report".	
Printed.....Vol. IV,	160–164
"FINAL JUDGMENT":	
Printed.....Vol. IV, p.	167–182
"Exhibit 5. PROCEEDINGS on motion TO AMEND THE REMITTITUR in the Court of Appeals":	
Introduced.....	5
Printed Vol IV.....	113–142
Order DENYING said motion, Vol. IV...	142a
"Exhibit 6. PORTIONS OF BRIEF of William Blaikie upon argument in the General Term":	
Introduced.....	582
Printed in Book of Briefs, &c.....	

	PAGE.
"Exhibit 7. PORTIONS OF BRIEF of William Blaikie upon argument in the Court of Appeals":	
Introduced	583
Printed in Book of Briefs, &c.	
"Exhibits 1–18 inc. December 16th, 1898;" "NOTICES OF APPEAL to the GENERAL TERM":	
Introduced	585
Printed "case on appeal"	910–1022
"Exhibit 5, December 16th, 1898"; "NOTICE OF APPEAL to the General Term on behalf of JOHN B. REYNOLDS and Morris B. Beardsley, AS EXECUTORS *et al.*, and Mary W. Achter and Emma S. Fayerweather":	
Introduced	587
Printed "case on appeal"	971
"Exhibits 19–22 inc., December 16th, 1898"; "NOTICES OF APPEAL to the Court OF APPEALS":	
Introduced	590
Printed "case on appeal"	1075—1089
"Defendant's Exhibit 19, December 16th, 1898, NOTICE OF APPEAL to the Court OF APPEALS on behalf of JOHN B. REYNOLDS and Morris B. Beardsley, AS EXECUTORS *et al.*, and Mary W. Achter and Emma S. Fayerweather":	
Introduced	590
Printed "case on appeal"	1075
"Defendant's Exhibit 23, December 16th, 1898, ORDER of the General Term AFFIRMING the JUDGMENT AT SPECIAL TERM":	
Introduced	592
Printed "case on appeal"	1057

"Defendant's Exhibit 24, December 16th, 1898, JUDGMENT of the Supreme Court entered UPON THE order of AFFIRMANCE made by the General Term": PAGE.

Introduced 592
Printed "case on appeal" 1064

ORDERS AND DECREES RELATING TO PLEADINGS, PROOFS AND PRINTING OF RECORD OF DEFENDANTS HAMILTON COLLEGE, AMHERST COLLEGE, WILLIAMS COLLEGE, UNION THEOLOGICAL SEMINARY, NORTHWESTERN UNIVERSITY, UNIVERSITY OF ROCHESTER, AND OTHERS.

PAGES.

INTERLOCUTORY decree of July 23rd, 1900, sustaining plea of Hamilton College to amended bill, Vol. IV..... 624

FINAL DECREE of January 14th, 1901, dismissing amended bill as to Hamilton College, Vol. IV..... 629

OPINION of Judge Lacombe, filed August 12th, 1901, denying motion to open decree for further proof, Vol. IV..... 610

ORDER entered August 21st, 1901, upon above opinion, Vol. IV..... 648

ORDER of January 30th, 1901, as to printing of Hamilton's record, Vol. IV..... 630

GENERAL ORDER of May 26, 1902, AS TO PLEADINGS AND RECORD, Vol. IV..... 657

STIPULATIONS and ORDERS as to plea and answer to amended bill and proofs of defendants, Trustees of AMHERST College, President and Trustees of WILLIAMS College, and UNION THELOGICAL SEMINARY, Vol. I. 228—239

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants,

1 AGAINST

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN,
Defendants.

JOHN B. REYNOLDS, as Executor, &c., of LUCY FAYERWEATHER,
Complainant,

2 AGAINST

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN,
Defendants.

Before JOHN A. SHIELDS, Esq., Examiner.

NEW YORK, November 30, 1900.

Testimony taken on behalf of the defendants RITCH, BULKLEY and VAUGHAN, upon the pleas.

THOMAS DALY.

APPEARANCES:

ROGER M. SHERMAN, Esq., Solicitor for Complainants;

JOHN E. PARSONS, Esq., Hon. STEWART L. WOODFORD, CHRISTIAN N. BOVEE, Jr., Esq., JOHN McG. GOODALE, Esq., and WILLIAM E. CARNOCHAN, Esq., of Counsel for Defendant.

WILLIAM BLAIKIE, Esq., Solicitor for John B. Reynolds, as executor of the last will and
3 testament of Lucy Fayerweather, deceased.

THOMAS DALY, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

DIRECT-EXAMINATION by Mr. Parsons:

1 Q. Are you connected with the County Clerk's Office? A. Yes, sir.

2 Q. Of the County of New York? A. Yes, sir.

3 Q. Have you under a subpœna produced certain papers from the County Clerk's office? A. Yes, sir.

4 Q. Papers regularly on file there? A. Yes, sir.

5 Q. Among them is the record of the action brought by the Trustees of Amherst College and others against Thomas G. Ritch and others? A. I presume so,
4 Mr. Parsons; I have not examined them.

6 Q. Look and see, please? A. Yes, sir.

Mr. Parsons: We offer first the record on the appeal to the General Term?

Mr. Sherman: That is objected to on the ground that under the issues the judgment roll is the only competent evidence, and that the introduction of the testimony is immaterial, irrelevant and incompetent and oppressive.

The paper was marked Defendants' Exhibit No. 1, November 30th, 1900, C. B.

Mr. Parsons: We next offer in evidence the record on the appeal to the Court of Appeals; and we are willing to stipulate that so far as that record embraces the record on the appeal to the General Term, only the record of the Court of Appeals shall be used. We ask to have it marked.

Mr. Sherman: Objected to on the ground that the Supreme Court at General Term, under pretense of affirming the judgment of the Court below, made
5 and affirmed a judgment not within the pleadings in the action, but in conflict therewith, and that the proceedings thereafter were without jurisdiction and void, including the order and judgment of the General Term; and also as incompetent, irrelevant and immaterial and not within the issues.

Mr. Goodale: There is on file with the Clerk of this Court a stipulated copy.

Mr. Parsons: And the record which we offer is the record which is on file with the Clerk of this Court. Do you desire that it should be brought here and marked, Mr. Sherman?

M. Sherman: No.

Marking waived.

6

Mr. Parsons: We offer in evidence an order made in that action bearing date March 10, 1897, made by the Special Term of the Supreme Court, ordering that the judgment of the Court of Appeals be made the judgment of the Supreme Court.

Mr. Sherman: That is objected to for all the reasons last stated.

The paper was marked Defendants' Exhibit No. 3, November 30th, 1900, C. B.

Mr. Sherman: I would consent to your putting in any mere paper at any time that would suit your convenience.

Mr. Parsons: The papers that we offer, in addition to those which have been previously offered, are the judgment roll in the Amherst College suit, including the judgment entered on the decision of the General Term, the appeal to the Court of Appeals, the remittitur of that Court, and the papers on the motion to
7 amend the remittitur and for a reargument, the order of the Court of Appeals upon that motion, the order of the Special Term already marked, making the decision of the Court of Appeals the judgment of the Supreme Court, and the final judgment entered in the action.

Mr. Sherman: Is that in addition to, or in place of this appeal book that has been offered which contains those?

Mr. Parsons: And so far as the present offer embraces papers which are in print, or papers which are upon the files of this Court, we are willing to stipulate that the papers on file be used in their stead, and the printed papers be used in the place of manu-
8 script papers.

Mr. Sherman: Each, every and all of them are objected to, for the reasons last stated in full.

Mr. Parsons: By this Court we mean the Circuit Court and the Circuit Court of Appeals, and the papers referred to are papers which are on file either in the direct suit, the cross suit, or upon the special plea of Hamilton College.

Mr. Sherman: I consent that the papers referred to may be used upon the final hearing, and upon any appeal herein, without incorporating them in the record physically, providing the defendants make like stipula-

tions on their part, reserving all objections as to their competency, materiality and relevancy as evidence.

Mr. Parsons: We make that consent.

JOHN B. REYNOLDS, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

DIRECT-EXAMINATION by Mr. Parsons.

9

1 Q. Are you the executor of Mrs. Lucy Fayerweather? A. Yes, sir.

2 Q. And as such are you the complainant in the cross-bill? A. Yes, sir.

3 Q. Do you live in the City of New York? A. No, sir.

4 Q. Where are you living at the present time? A. Vermont.

5 Q. At this identical moment? A. I am breathing the universal air at the present moment in New York.

6 Q. Have you a house in New York? A. No, sir.

10

7 Q. Did you at one time live in East Fifty-seventh street in this city? A. My wife has a house there, and in the winter time since our marriage we have spent part of the winters here.

8 Q Are you there now? A. Yes, sir.

9 Q. How long have you been there? A. Well, since our marriage we have been there as we are now. We have been four winters in California——

10 Q. I mean how long have you been there for the season of 1900? A. Well, the house has been opened a good part of the season of 1900 from necessity.

11 Q. When did you move in for the winter of 1900

or the autumn? A. Well, I do not know that I could give you that date. The house has been open all summer, and we have been back and forth.

12 Q. During the summer? A. Yes.

13 Q. Back and forth between—— A. Vermont and New York. We have frequently been required to come here on account of this litigation, otherwise we should be living in Vermont all the year around. We should have spent our Thanksgiving there only for this litigation.

11

14 Q. In what part of Vermont? A. When we have been keeping house, which has been every summer but the last two, at Rutland; when we are boarding in Vermont we are either at Rutland with my sister, Mrs. Cheney, Mr. George H. Cheney, my brother in law, or at Strafford, where I have extensive business, at the hotel.

15 Q. Have you a house in Vermont? A. Yes, sir; I have five.

16 Q. I mean a residence house? A. I have had until the last two years one for thirty-five years.

17 Q. And where in Vermont? A. At Rutland, Vermont.

12

18 Q. During the last two years have you had a residence house in Vermont? A. Yes, sir.

19 Q. Where? A. At Cuttingsville, Vermont.

20 Q. Which you have occupied? A. No; when I sold my house, which I had for upwards of thirty years, I bought a house and farm of 270 acres in the Village of Cuttingsville adjacent to some mining property which I have there, and I have rented it to a party, reserving such rooms in it as I might require.

21 Q. During what part of the last two years—— A. He keeps boarders in the summer and I have my choice of the rooms.

22 Q. During what part of the last two years have you occupied rooms in that house? A. Well, I have not occupied that very much, because he has not been there but one year. When I bought it it was occupied by a Frenchman, with whom I did not have the desire to live, and another year we expect to occupy it a considerable part of the season.

13

23 Q. Well, does that mean that you have not occupied rooms there at all? A. No, sir.

24 Q. What does it mean? A. It means that I have been there whenever I had business to go to Cuttingsville, except on one occasion, and then I had company, Professor Treadwell, of Arizona, of the United Copper Mine, and I did not feel like taking him to the house. They were pretty full and we went to the hotel. On all other occasions I have been at our own house.

25 Q. And that means that you have occupied the rooms to which you have referred for how many days during the last two years? A. Oh, not many days there at that place.

14

26 Q. Specify the number? A. Well, I do not know as I could do that.

27 Q. One? A. Yes.

28 Q. More than one? A. Yes, I think considerably more than one, but I would not like to state.

29 Q. You won't swear more than one? A. No. I have been there a good many times, but whether I went down from Rutland and spent the day—that is only ten miles out of Rutland—I frequently take Mrs. Reynolds and leave her there when I go down to Cuttingsville.

30 Q. Will you swear to one day? Yes, sir.

31 Q. Fix that day? A. Well, I think it is in July, I would not want to be definite about the day, I can tell by my letter book I think.

32 Q. July of what year? A. 1900.

33 Q. Have you any personal acquaintance with the complainants in the original bill, Emma S. Fayerweather and Mary W. Achter? A. Yes, sir; I have met them.

15

34 Q. When and where? A. I met Miss Emma Fayerweather in Riverside, California, in Los Angeles, California, and I think in Seattle—or at Tacoma—at different times; and I have met her also at Muscatine, Iowa, and her sister at Muscatine; I have met her also at Chicago; I have met her also at my house in Rutland, Vermont, entertained her there, both her husband and wife and herself.

By Mr. Sherman:

35 Q. What did you say? A. Both Mrs. Achter, her sister, and her husband Mr. Achter, and her daughter, they were all there.

16

By Mr. Parsons:

36 Q. Have you corresponded with them? A. Yes, sir.

37 Q. Have you copies of your letters to them? A. I think I have most of them.

38 Q. In a letter press copy book? A. Yes, sir—quite interesting to the defendants in this case.

Mr. Sherman: I would not volunteer anything, Mr. Reynolds.

39 Q. Have you received replies to such letters? A. Some of them.

40 Q. Are the replies which you have received in your possession? A. Yes, sir.

41 Q. In the City of New York? A. Chiefly, I think.

42 Q. Exclusively, so far as you now remember? A. Well, there may be some among my effects at Rutland.

43 Q. Have you any recollection that any are there? A. Not besides I know I wrote them while I was there, and probably received answers there.

44 Q. Where is your letter press copy book, or where are your letter press copy books?

17

Mr. Sherman: I object to that as immaterial, and advise the witness not to answer.

The Witness: On advice of counsel I shall have to decline to answer.

45 Q. Are they in the City of New York?

Mr, Sherman: I make the same objection and give the same advice.

The Witness: I will have to give the same answer.

46 Q. Where are the complainants in the original bill at the present time, so far as you know?

18

Mr. Sherman: Objected to as not within the issues, and as having no bearing on the issues, and as a fishing excursion, and whereupon I advise the witness not to answer.

A. I could not reply to it.

47 Q. You mean that you are unable to reply to it? A. Yes, sir. I could direct a letter which would probably reach them, but exactly where they are I could not say.

48 Q. Where would you direct a letter to Miss Emma S. Fayerweather?

Mr. Sherman: I make the same objection and give the witness the same advice.

The Witness: That is not to answer.

Mr. Sherman: Yes, not to answer.

The Witness: I decline, under the advice of counsel, to give the information.

49 Q. Where would you direct a letter to Mrs. Mary W. Achter?

Mr. Sherman: I give the same advice to the witness and make the same objection.

The Witness: And I give the same answer.

50 Q. Did you ever meet them or either of them in the City of New York? A. Well, I have a faint recollection that I did at one time, but I would not want to say positively.

51 Q. According to such faint impression or recollection as is in your mind, where do you think that you may have met them, and which of them?

Mr. Sherman: I object to that as incompetent, irrelevant and immaterial, and not within the issues, as afishing excursion, and I advise the witness not to answer.

The Witness: I decline to answer, under the advice of counsel.

52 Q. Did you see them or either of them preliminary to the commencement by them of their action, the action upon the original bill?

Mr. Sherman: I repeat the objections last made and advise the witness not to answer.

The Witness: My answer is the same as the preceding.

53 Q. Did you write to them or either of them when there was under consideration the commencement of their action on the original bill in this suit?

Mr. Sherman: I make the same objections and give the witness the same advice.

The Witness: I will give the same answer.

54 Q. Was the suit, as brought upon the original bill in their names, commenced under any arrangement between you and them?

21

Mr. Sherman: I make the same objections and give the same advice.

The Witness: And I make the same reply.

55 Q. Was it brought at your instigation?

Mr. Sherman: I make the same objection and give the same advice.

The Witness: The same reply.

56 Q. When did you become the executor of Mrs. Fayerweather? A. I suppose upon her death, if you mean the time the will was admitted to probate.

57 Q. No, I mean the time that letters testamentary were issued to you?

22

Mr. Sherman: That is objected to, as that must appear by the record.

Mr. Parsons: I will ask you to answer that question. State it according to your best recollection? A. Well, the summer following her death, I think it was the summer of 1892.

58 Q. Where was Mrs. Fayerweather living at that time? A. In heaven.

59 Q. I mean at the time of her death? A. Well, that is quite another thing. She was living with me at my house in Rutland; she died there.

60 Q. Did she at that time have a residence in New York, and if so, where?

Mr. Sherman: Objected to on the ground that the question is a matter that is not within the issues, as incompetent, irrelevant and immaterial, and I advise the witness to decline to answer.

The Witness: Under advice I decline to answer.

61 Q. Did there ever come into your possession papers which had belonged to Mrs. Fayerweather? A. Some, I think.

23

62 Q. Where were those papers at the time of Mrs. Fayerweather's death?

Mr. Sherman: That is objected to as immaterial and not within the issues, and as incompetent, and I advise the witness to decline to answer.

The Witness: I could not answer it if I had not been advised not to answer it.

63 Q. Can you answer as to any? A. If you can specify, possibly.

64 Q. What is the number on Fifty-seventh street of the house that you speak of as your wife's house? A. No. 11.

24

65 Q. Did you reside there or did you live in the house prior to Mrs. Fayerweather's death?

Mr. Sherman: That is objected to as incompetent, irrelevant and immaterial and not within the issues, and as a fishing excursion, and I advise the witness not to answer.

A. I spent the winter preceding Mrs. Fayerweather's death in California with Mrs. Fayerweather, Mrs. Reynolds, my brother-in-law by my former wife, and some

others, leaving about two or three months after our return from spending the summer in Saratoga, and we perhaps lived at the house 11 East Fifty-seventh street——

Mr. Sherman: You do not take my advice, Mr. Reynolds.

The Witness: No, I thought I would gratify them. We perhaps lived in the house two months before we went to Rutland and spent the summer there in the house where she died; that covers all the time.

25

66 Q. Was there any other place that you know of except the house No. 11 East Fifty-seventh street where Mrs. Fayerweather kept her papers?

Mr. Sherman: The same objection to that, as incompetent, irrelevant and immaterial and not within the issues, and as a fishing excursion, and I advise the witness not to answer.

The Witness: Under advice of counsel I decline to answer.

67 Q. Have you ever made an examination of such papers which had belonged to Mrs. Fayerweather as came into your possession?

26

Mr. Sherman: Same objection and the same advice.

The Witness: I make the same reply.

68 Q. Do you know Mr. Frederic R. Coudert? A. I have met him; yes, sir.

69 Q. At his office? A. Yes, sir.

70 Q. Do you know Mr. Daniel J. Holden? A. I have met him.

71 Q. Is he a member of Mr. Coudert's firm, as you understand?

Mr. Sherman: That is objected to as immaterial.

A. I think that is the general understanding, I have no knowledge.

72 Q. Did you meet him at Mr. Coudert's office?

Mr. Sherman: Objected to as immaterial.

A. I think I did on one occasion, possibly two.

73 Q. When was it? Fix as nearly as you can the time when you saw Mr. Coudert and Mr. Holden.

27

Mr. Sherman: That is objected to as an abuse of the right of examination under the 67th rule, as an attempt to enter upon a fishing excursion, and as an endeavor to lead up to the disclosure of privileged communications. In connection with the objection, I submit a subpœna served upon this witness and ask to have it marked in connection with my objection, and I ask the Examiner to certify the objections previously made to questions as to which the witness has declined to answer to the Court.

The subpœna was marked Complainants' Exhibit No. 1, November 30, 1900, C. B.

28

Mr. Parsons: Answer that question.

Mr. Sherman: We will go to the Court.

Mr. Parsons: No, I will take an answer. The witness has not refused to answer.

Mr. Sherman: This is a regular application which must be pursued before anything else is done.

Mr. Parsons (to the witness): Do you make any response to my question?

Mr. Sherman: You need not enter into any conversation with Mr. Parsons, that is to say, if it is going on the record.

74 Q. Among the papers of Mrs. Fayerweather which came into your possession, were there letters from Mr. Coudert and Mr. Holden, either or both?

Mr. Sherman: Mr. Reynolds, I am going to attend to something more interesting than this, and I advise you that you have a right to do the same.

Mr. Parsons: I will ask Mr. Shields to step here. It may be necessary to apply to have some one punished for contempt.

29

75 Q. Were there such letters advising Mrs. Fayerweather upon the subject of whether Mr. Fayerweather's testamentary papers did or did not create a trust?

Mr. Sherman: Mr. Reynolds, I will be answerable for any attempted proceedings for contempt in this matter.

Mr. Parsons: I will ask another question.

The Witness: I guess Mr. Parsons would go bail.

76 Q. Are you, as executor of Mrs. Fayerweather, willing to permit Mr. Coudert or Mr. Holden, either or both, to testify to the advice that they gave to Mrs. Fayerweather upon the subject of any trust cre-
30 ated by Mr. Fayerweather's testamentary papers?

At this point Mr. Sherman and the witness left the room.

Mr. Parsons: Counsel for the defendant executors asks the Examiner to fix as a date for the continuation of the taking of evidence Monday, December 3, 1900, at 11 A. M.; and asks him to direct the witness on the stand, John B. Reynolds, to be present at the time.

JOHN B. REYNOLDS.

At the request of counsel for the defendants, the foregoing record is certified to the Court.

JOHN A. SHIELDS,
Examiner.

NEW YORK, December 3, 1900, 11 A. M.

Present—The EXAMINER, Mr. CARNOCHAN and Mr. GOODALE.

31

———

NEW YORK, December 3, 1900, 4 P. M.

Present—The EXAMINER, Mr. PARSONS; Mr. BOVEE, Mr. GOODALE, Mr. CARNOCHAN and Mr. SHERMAN.

Mr. Parsons: I propose to ask this question——

Mr. Sherman: Mr. Reynolds, if you follow my view you will not attend here any further or make any response.

Continuation of the examination of Mr. JOHN B. REYNOLDS by Mr. Parsons.

32

77 Q. Did you appear here at the last examination in obedience to a subpœna served upon you?

The Examiner: Do you instruct the witness not to answer, Mr. Sherman?

Mr. Sherman: I do not think we are here for the purpose of going on with the examination until the question is certified to the Court.

Mr. Parsons: I want to have the Examiner certify that in the midst of the examination the witness leaves the room without the permission of the Examiner. Has the witness, now being under cross-examination, the

right to leave the room without the permission of the Examiner? Upon that point I want the certificate of the Examiner.

Mr. Sherman: I contend that we are under no obligation to attend further upon what we claim to be a gross abuse of the process of the Court, and demonstrated by the record so to be, until the Court has defined our obligation in that respect; and I advise Mr. Reynolds to decline to participate in the examination until that question is determined.

33

Mr. Parsons: I will ask this further question, the witness still being here:

78 Q. Did you produce at the last session the papers called for by the subpœna?

Mr. Sherman: When you can indicate, Mr. Examiner, that it will be convenient or proper to proceed with the certificate, I will attend.

79 Q. Were those papers, or any of them, in your possession?

At this stage the witness left the room.

34

Mr. Parsons: Counsel for the defendant executors asks the Examiner to certify that during the session on November 30th, and while the witness Reynolds was under examination, he and his counsel, without the permission of the Examiner, left the room, and thus compelled a termination of the proceeding; and that to-day, the examination being resumed and the witness being present, he again left the room without the consent of the Examiner and while under examination.

The Examiner so certifies.

JOHN A. SHIELDS,
Examiner.

Adjourned to December 13, 1900, at 11 A. M.

JOHN B. REYNOLDS.

NEW YORK, December 13, 1900.

Present—The EXAMINER, Mr. CARNOCHAN and Mr. GOODALE.

Adjourned to December 20, 1900, at 11 A. M.

NEW YORK, December 20, 1900.

Present—The EXAMINER, Mr. BOVEE, Mr. CAR-
35 NOCHAN and Mr. GOODALE.

After waiting half an hour and no one appearing for the complainant, adjourned to December 27, 1900, at 11 A. M.

NEW YORK, December 27, 1900.

Met pursuant to adjournment.

Present—The Examiner, Mr. BOVEE and Mr. CARNOCHAN.

After waiting thirty-five minutes and no one appearing on behalf of the complainant, the defendants, the executors, then offered the following:

36

Mr. Bovee: We offer in evidence the brief of plaintiffs Fayerweather and Achter, by William Blaikie and Edward C. James, in the case of Amherst College and others, against Ritch and others, in the Court of Appeals; also the brief of John B. Reynolds, as executor of Lucy Fayerweather, in the Court of Appeals; also the brief of the same parties on the motion for a reargument and for an amendment of the remittitur in the Court of Appeals; also the brief of the plaintiffs in this proceeding, Fayerweather and Achter, and of the

plaintiff in the cross-bill, John B. Reynolds, as executor of Lucy Fayerweather, submitted to the General Term of the Supreme Court in the case of Amherst College and others against Ritch and others, by William Blaikie and Edward C. James, as counsel.

The papers were admitted in evidence and marked Defendants' Exhibits 1, 2, 3 and 4 respectively.

Adjourned to January 3, 1901, at 11.30 A. M.

37

38

Decision by Lacombe, J.

Motion to punish witness for contempt in failing to answer certain questions, failing to produce certain papers, and leaving the stand while under examination. The following rulings are made as to the questions: Qs. 44 and 45. Witness must answer. Qs. 48 and 49. Witness must answer. Qs. 51, 52 and 53. Witness must answer. Qs. 54 and 55. Witness must answer. Q. 60. Witness must answer. Q. 66. Witness must
39 answer. Q. 67. Witness must answer. Q. 74. Witness must answer. Q. 75. Witness need not answer. Q. 76. Witness need not answer. Whether or not he is willing to waive any claim that communications between his predecessor and her counsel are privileged, is a matter he or his counsel will decide whether evidence of such communications are offered. Q. 77. Witness must answer. Q. 78. Witness must answer. Q. 79. Witness must answer. As to the letters to Mrs. Fayerweather from her counsel giving advice or stating facts relevant to the matter in which they were retained, the same are privileged. Witness, however, must bring the papers into court, if he has them or can control them, and the Court will then decide as to any which may be sub-
40 mitted, whether they are or are not covered by the privilege. The defendants should not be left to the witness' determination of that question. If witness complies with these instructions, the motion to punish him for contempt will be denied ; otherwise he will be committed to the custody of the marshal until he does so comply.

JOHN B. REYNOLDS.

NEW YORK, January 3, 1901.

Met pursuant to adjournment.

Present—Mr. PARSONS, Mr. BOVEE, Mr. BISHOP, Mr. CARNOCHAN, Mr. FAIN, Mr. SHERMAN, Mr. BLAIKIE, Mr. STIMSON, Mr. MCLOUGHLIN, and a representative of Messrs. Nash & Jones.

41

Continuation of the EXAMINATION of JOHN B. REYNOLDS:

By Mr. Parsons:

80 Q. Pursuant to the ruling of Judge Lacombe, you are required to answer question No. 44, which reads: "Where is your letter press copy book, or where are your letter press copy books"? A. Part of them are in New York, I think all of them, but 1 have not been able to find them all yet.

81 Q. Have you any reason to suppose that any of them are away from New York? A. I have a memorandum that one of them is not in my pos-
42 session, and I think it is in New York, but I could not say it was.

83 Q. A letter book covering what dates? A. Well, that memorandum shows and I have not the memorandum with me; it is between 1892 and the present time.

84 Q. Is that as definite as you can be? A. It is as definite as I should want to be; I should say it was not last year or the year preceding; I do not remember the exact year.

85 Q. Have you now been as definite as you can be? A. I think so.

86 Q. How many letter press copy books are in New York? A. Between what dates, Mr. Parsons, do you want?

87 Q. Covering a period commencing with the death of Mr. Fayerweather, and continuing down to the present time? A. Well, I should think there was four or five, possibly six.

88 Q. Are they continuous in date? A. I think they would be with the exception of one that I refer to.

89 Q. Do you mean to state that that makes a gap in the sequence of dates? A. I have not got that letter book at all in my possession, as appears by my memorandum; I have not looked to see in the place,
43 where I should, perhaps, find that; I have not had an opportunity to; I will do that.

90 Q. Do you mean to be understood that you have made any effort to look for that book? A. No, sir; I have not had any time to go to the party that had it.

91 Q. Who is the party? A. Col. James or in his office; it seems I took a letter book there on some occasion and made a memorandum of it, where the letter book should be, that it was taken there. With the exception of that I think I can account for all my letter books.

92 Q. Well, have you made any efforts since you were served with the subpœna to obtain the book which you think is in the possession of Col. James? A. I said that I had not had the time to look it up
44 from since I discovered its absence; I supposed I could put my hand on all of them until I went to look for them, and I found that one was not there.

93. Q. When did you make that discovery? A. Well, yesterday or to-day.

94 Q. Yesterday? A. I think that—I was getting out my letter books, supposing that I had them all, to come here this morning, and between the letter books I found that memorandum, and I suppose it is in one of those letter books that is in that pile. It is possible that I put the letter book back there and have not destroyed that memorandum, but I would not want to say that they are all there.

95 Q. Did Col. James act as your counsel on the trial before Judge Truax? A. Well, I said the office of Col. James; I do not mean to say that I delivered the letter book to him; I think the person that I delivered it to was Mr. Elkus.

96 Q. Is he Col. James' partner? A. Yes, sir.

97 Q. Was Col. James counsel for you on the trial before Judge Truax?

Mr. Sherman: Objected to as immaterial.

45

A. Yes, sir.

98 Q. You are asked to answer question No. 48 pursuant to the requirement of Judge Lacombe, the question reading: "Where would you direct a letter to Mrs. Emma S. Fayerweather?" A. At the time that question was asked it would be impossible for me to answer it better than to say, Seattle, Washington; I knew that she was not there at that time, but where I could not say, or at least I supposed she was not there, but it would follow her.

By Mr. Sherman:

99 Q. That it would follow her? A. Follow her from Seattle.

46

By Mr. Parsons:

100 Q. When last did you write to her? A. Well, I think within the last month, some time at Seattle.

101 Q. I do not ask about Seattle. When last did you write to Miss Emma S. Fayerweather? A. I think some time in the last month.

102 Q. Be as definite as you can. When during the last month? A. I could not say; the time flies so rapidly; I should say it was after the 15th, but it might be prior to that.

103 Q. After the 15th of December? A. Yes, sir.

104 Q. Was it since your examination began? A. I do not think so.

105 Q. Cannot you be positive? A. No.

106 Q. It may, then, have been since your examination began? A. It is possible, but I think it was prior to that. I do not know the date of the examination.

107 Q. Where did you address that letter? A. Seattle.

47

108 Q. Have you heard from her lately? A. Yes, sir.

109 Q. When? A. Well, I had a letter from her from Portland, Oregon, before she received mine.

110 Q. Is that the last information about her whereabouts that you have? A. Well, no, I do not think so. I have had one or two communications from Mr. Achter or her attorney I think, and, possibly, from her.

111 Q. Whom do you speak of as her attorney? A. Jane & Hoffman, of Muscatine, Iowa, one of her attorneys.

48

112 Q. Are they the persons to whom you refer? A. Yes, sir.

113 Q. Were the communications from Mr. Achter verbal or in writing? A. In writing.

114 Q. Have you had no verbal communication from him lately? A. No, sir.

115 Q. When did the written communication from him come to you? A. Well, it was in answer to my inquiry where Emma would be, and I think he told me that she had left Seattle and gone to Portland, and that her address there would be at the General Post Office; that is my recollection of the substance of his letter.

116 Q. When was this? A. Well, it was after I wrote to her, I think, at Seattle.

117 Q. Before or subsequent to the commencement of your examination?

Mr. Sherman: Suppose we fix that date. It is November 30, 1900. I do not want to have any controversy about dates.

A. I think if you cannot tell me the date by your minutes you ought not to ask me to remember it.

49

120 Q. I ask you to remember the fact that you began to be examined and wish to know whether what you state occurred before or after you were put upon the stand? A. Well, I could not answer it without reference to the minutes or your telling me when the case began.

121 Q. According to the minutes your examination down to the time that you broke it off took place on November 30, 1900. Having that date given to you, can you now state the time of the last communication between you and Mr. Achter? A. Well, I should think it was subsequent to that date. I could not be any more definite without reference to my book. I am
50 quite sure it was since then, but I thought it was since the 15th of December, but I may be wrong about it.

122 Q. I understand you to state here—see whether I am correct or not—that since then you have had no communication, either written or oral with Mr. Achter? A. Since what?

123 Q. Since the correspondence one way or the other which you locate as about the 15th of December? A. Well, I may have had more than one letter from Mr. Achter during that time?

124 Q. When last did you have any communication with Mr. Achter? A. Personal?

125 Q. Personal or otherwise? A. I do not remember.

126 Q. State your best recollection? A. Well, I should say several months at least had elapsed.

127 Q. Where at that time would you have directed a letter to her? A. Well, a letter directed to Muscatine, Iowa, would always follow them; that has been my experience. I think they are now in Chicago.

51

128 Q. Do you mean to be understood that so far as you at the present time are informed, desiring to write to Mrs. Fayerweather, you would address her at Seattle? A. No, I do not think she is permanently there.

129 Q. Where would you address a letter to her at the present time? A. Well, I have said, I think, that if you addressed one to Muscatine, Iowa, or Seattle, it would follow her.

130 Q. Is that the best information which you have about her present whereabouts? A. Well, I do not know as I could say as it is the best; it is one of the certain informations.

52

131 Q. What other information have you? A. Well, her attorney telegraphed me, I think, that she was going to be there at a certain time.

132 Q. Be where? A. In Muscatine.

133 Q. At what time? A. Well, I would not say whether it was he or Mr. Achter.

134 Q. When did you receive this telegram? A. I should say it was within the last fifteen days.

135 Q. Within the last week? A. I think not.

136 Q. And where at the present time would you address a letter to Mrs. Achter? A. Well, if you address

it to 11 East Fifty-seventh street, New York, I will see she gets it; that is the best address I can give you, all information I could give you; I know how to send it to her.

137 A. Is 11 East Fifty-seventh street the house in which you reside? A. No, sir; it is where I am stopping, where I am spending the winter.

138 Q. Your wife's house? A. Yes, sir.

139 Q. What I want to know is where, if you desired to have a letter reach her, you would address her?

53

Mr. Sherman: Reach whom?

Mr. Parsons: Mrs. Achter.

A. Oh, I thought you wanted to write to her, Mr. Parsons. It is on Fifty-fourth street in Chicago, where they are spending a few months, perhaps all the winter, the number I cannot give you, but I will if you will give me time to go to the office.

140 Q. Under the requirement of the Court, we repeat to you question No. 51, which asks, "According to such faint impression or recollection as is in your mind where do you think that you may have met them and each of them?" referring to Mrs. Fayer-

54 weather and Mrs. Achter? A. I think I met Mrs. Achter at the Grand Union Hotel, if remember right, in New York.

141 Q. When? A. That is some years ago, I think about the time this original suit was begun, after the Surrogate's contest.

142 Q. What suit do you refer to? A. Well, I should think the one I brought in—I guess it was after the one that Mrs. Fayerweather brought, she began one before her death, and I think it was about that time, either before or after, I cannot say which.

143 Q. Is that the only occasion when you ever met Mrs. Achter? A. Oh, no, sir.

144 Q. Is it the only occasion when you ever met her in the City of New York? A. I think it is.

145 Q. Answer the same question with reference to Miss Emma Fayerweather? A. That is, where I met her.

146 Q. Yes? A. Well, Mrs. Achter and Mr. Achter and Miss Fayerweather came on to my house in Vermont in connection with this business about the time the suits were begun.

55

147 Q. What suits? A. Well, the ones that are in the various records, I cannot say which ones; our original suit of Mrs. Fayerweather and the five colleges' action is the one I refer to, those suits, it was prior to that or about that time.

148 Q. Have you ever seen Miss Emma Fayerweather in the City of New York? A. It is possible.

149 Q. When? A. Well, I saw her this morning.

150 Q. Where? A. 11 East Fifty-seventh street.

151 Q. We ask you to answer question No. 53 which Judge Lacombe has directed you to answer. It reads, "Did you write to them or either of them (referring to Miss Emma Fayerweather and Mrs. Achter) when
56 there was under consideration the commencement of their action on the original bill in this suit?" A. I am a little bit confused as to which suit you refer to, Mr. Parsons; this is the cross-bill we are taking testimony under now.

152 Q. We are taking testimony in both. A. The question is did I communicate with them —

153 Q. "Did you write to them or either of them when there was under consideration the commencement of their action on the original bill in this suit?" A. Well, I presume I did.

154 Q. To both of them? A. I think I went out there to see them, but I would not want to swear positively

to that; probably there was correspondence preceding that.

155 Q. Did you write to both of them? A. Well, I hardly think it was necessary, one would be sufficient, perhaps I did, they were living in the same house at that time.

156 Q. Where? A. In Muscatine, Iowa.

157 Q. Have you copies of such letters as you wrote to them at that time? A. I think so.

57

158 Q. In the letter press copy books which are in your possession? A. Yes, sir, probably; it is very rare that I write a letter and do not copy it.

159 Q. We ask you to answer question No. 54 which Judge Lacombe has required you to answer. It reads, "Was the suit that was brought upon original bill in their names commenced under any arrangement between you and them?" A. Yes, sir.

160 Q. Is that arrangement shown in writing? A. In writing?

161 Q. In writing? A. Yes, sir.

162 Q. Where is the writing? A. It is in the hands of my attorney.

163 Q. Produce it.

58

The Witness: Mr. Sherman?

Mr. Sherman: I advise the witness to decline to produce it on the ground that the contents of such a writing cannot be competent, relevant or material evidence under the issues in this case, and because the same is privileged.

A. Under the advice of counsel, I decline to produce it.

164 Q. State the contents? A. That would be impossible.

165 Q. State so much of the contents as you can remember.

Mr. Sherman: I give the witness the same advice.

A. And I decline on the same ground.

Mr. Parsons: We ask the Examiner to certify the refusals of the witness to the Court.

The Examiner so certifies.

59

166 Q. We repeat Question No. 55, which Judge Lacombe has instructed you to answer. It reads: "Was it (referring to the suit brought upon the original bill) brought at your instigation?" A. I should want a dictionary to see how broad that word "instigation" is.

167 Q. State, according to your understanding of the term? A. It was brought under my advice.

168 Q. Did you open the subject? A. I think it was already opened between us.

169 Q. Did you open the subject?

Mr. Sherman: That is objected to on the ground that it, within its fair scope and meaning, calls for communications with counsel, and is, therefore, privileged.

Mr. Parsons: Answer, please.

60

Mr. Sherman: I advise the witness to decline to answer the question in that form for the reasons stated.

A. I decline to answer under the advice of counsel.

170 Q. I am not referring to what passed between you and counsel; I am referring to what passed between you on the one side and Miss Emma Fayerweather and Mrs. Achter, either or both, on the other.

Mr. Sherman: What was the question?

171 Q. Was the subject of the commencement of the suit opened by you to them? A. All that I did was

done under the advice of my counsel. I went where they advised me to go, and did what they advised me to do, and I should call them the instigators as well as myself.

172 Q. Have you now stated the circumstances under which the suit on the original bill was brought so far as concerns the action of yourself and of Mrs. Achter and Miss Emma Fayerweather? A. I have stated one of the circumstances.

61

173 Q. State any others. A. Well, it involved a trip of myself to Muscatine, Iowa.

174 Q. Were you accompanied by counsel? A. I was advised by counsel there who had been their advisers ever since the settlement of the Surrogate's contest, that was Jane & Hoffman, and with my counsel's and their counsel's advise this suit was brought.

175 Q. Are there any other circumstances bearing upon the subject? A. I do not recall any now; if you can make it a little more particular I could say whether there was or not.

176 Q. In view of what you have last testified to, do you still decline to give any information about the
62 arrangement between you on the one side and Miss Emma Fayerweather and Mrs. Achter on the other, under which the suit on the original bill was brought? A. I could not make any more liberal answer than I did before.

177 Q. Any more what answer? A. Any more liberal answer than I did before under the circumstances. I have been advised not to answer it.

178 Q. And you persist in your declination? A. I do not persist. I obey.

179 Q. Under the requirement of Judge Lacombe we request you to answer Question No. 60, which reads: "Did she (referring to Mrs. Daniel B. Fayerweather) at that

time (meaning at the time of her death) have a residence in the City of New York, and if so, where?"

Mr. Sherman: I object to that as incompetent, irrelevant and immaterial, and as involving merely the opinion of this witness upon the effect of facts not disclosed.

The Witness: Shall I answer?

Mr. Sherman: Yes.

63

A. I understand she resided at 11 East Fifty-seventh street.

180 Q. We repeat to you Question No. 65 which reads: "Did you reside there (referring to the house No. 11 East Fifty-seventh street) or did you live in the house prior to Mrs. Fayerweather's death?"

Mr. Sherman: The Judge's order does not call for any answer to that question.

181 Q. I repeat to you the question irrespective of Judge Lacombe's order.

Mr. Sherman: I think it is wholly immaterial, but I won't persist in the advice given.

64

A. Mrs. Fayerweather resided there, and I was there two weeks in July; about two weeks in July; perhaps two months after spending the summer in the country; Mrs. Fayerweather resided there for those two months, then we all went to California and stayed until May; we returned and remained in the house about one month, and went to my house in Rutland, Vermont, to spend the summer, and during the summer Mrs. Fayerweather's death occurred in my house in Rutland.

182 Q. Does your last answer state the length of time and periods during which you lived at No. 11 East Fifty-

seventh street prior to Mrs. Fayerweather's death? A. Yes, sir, as near as I can recollect.

183 Q. We request you to answer the question No. 66 which Judge Lacombe has directed to be answered. It reads: "Was there any other place that you know of except the house No. 11 East Fifty-seventh street, where Mrs. Fayerweather kept her papers?" A. I do not know as I quite follow that first part, Mr. Parsons. Read it again.

65

184 Q. Was there any other place that you know of except the house No. 11 East Fifty-seventh street where Mrs. Fayerweather kept her papers? A. Yes, sir; she had her safe deposit box in the Lincoln Safe Deposit Company.

185 Q. Is that the only other place? A. That is all that I know of, except about the house; she had a little tin box in the house, I think; she had some papers that were not thought necessary to be put in the safe deposit.

186 Q. Did the papers in the safe deposit box come into your possession? A. Yes, sir

187 Q. When? A. Well, from the time Mrs. Fayerweather took the box there I always had a key to it.

188 Q. Prior to her death? A. Yes, sir.

66

189 Q. Have Mrs. Fayerweather's papers at the house No. 11 East Fifty-seventh street in this city come into your possession? A. Yes, sir.

190 Q. When? A. Well, since her death. They were always in Mrs. Reynolds' charge prior to Mrs. Fayerweather's death, and when I became executor I gathered such as I thought were important to keep, and as executor I have held them.

191 Q. Have all the papers about which you have now testified, both those in the safe deposit box and those at

the house, remained in your possession since? A. Either in my attorney's possession or my own.

192 Q. In the City of New York? A. Yes, sir. Nearly all of them are in the custody of my attorneys.

193 Q. Placed there when? A. Well, part of them when Col. James was in the case with him, and all since my appointment as executor.

194 Q. Any of them since your examination in this suit was begun? A. Yes, sir; I think I gave my
67 attorneys the writings which you called for with Mrs. Achter and Miss Fayerweather—oh, Mrs. Fayerweather is that what you are calling for?

195 Q. By your preceding answer and your reference to the papers which we called for, do you mean those that you were subpœnaed to produce? A. My answer did not have the subpœna in mind at all.

196 Q. What did you mean by the expression "papers which we called for"? A. Why, that you are calling for now. I had lost the trail for a moment, whether you were speaking of Miss Emma Fayerweather or whether you were speaking of Mrs. Daniel B. Fayerweather. I understand now it is Mrs. Daniel B. Fayerweather's papers that you are inquiring about.

68

197 Q. Precisely. The question is whether you have put any of those papers in the possession of your attorneys since you were subpœnaed for this examination? A. I think I have.

198 Q. Is the same answer true of the paper containing the arrangement between you on the one side and Miss Emma Fayerweather and Mrs. Achter on the other under which the suit on the original bill was brought—has that been put in the possession of your attorneys since you were subpœnaed? A. Well, my attorneys and I have had it between us, and I think that I have given it to Mr. Sherman since that date.

199 Q. How recently? A. Well, I cannot remember dates very well.

200 Q. State your best recollection? A. Well, I should say since the examination began. We are getting papers together, of course, and in the multitude of them I cannot give a date when they were transferred from me to them.

201 Q. Was it before or after you heard of Judge Lacombe's decision? A. Before it, I think.

69

202 Q. Have you a downtown office? A. Yes, sir.

203 Q. Where? A. 35 Nassau.

204 Q. Is that the office of Mr. Blaikie? A. Yes, sir.

205 Q. We ask you to answer question No. 67, which Judge Lacombe has instructed you to answer. It reads: "Have you ever made an examination of such papers which had belonged to Mrs. Fayerweather (referring to Mrs. Daniel B. Fayerweather) which came to your possession?" A. If I have ever made an examination of them?

206 Q. Yes. A. Yes, sir.

207 Q. On various occasions? A. Well, yes, I have, I suppose.

70

208 Q. Have you made such an examination since you were served with a subpœna for your present examination? A. Yes, sir.

209 Q. Where? A. I made an examination in my box in the safe deposit and in my office, and I think I have talked with both of my attorneys in relation to what they had.

210 Q. Did you make any examination at the house No. 11 East Fifty-seventh street? A. No, I did not, because I know there was nothing there, at least I suppose there is nothing there.

211 Q. We request you to answer question No. 74 which Judge Lacombe has directed you to answer. It reads: "Among the papers of Mrs. Fayerweather (referring to Mrs. Daniel B. Fayerweather) which came into your possession, were there letters from Mr. Coudert or Mr. Holden, either or both? A. Will you read that again, Mr. Parsons?

212 Q. "Among the papers of Mrs. Fayerweather (referring to Mrs. Daniel B. Fayerweather) which
71 came into your possession, were there letters from Mr. Coudert or Mr. Holden, either or both?" A. I think there was.

213 Q. How many? A. Well, they are not numerous; I cannot say how many.

214 Q. State your best recollection of the number? A. Well, I have not got all the results of my efforts in searching yet, Mr. Parsons. There are perhaps others that will come to light; I am taking all the steps that I can to get them.

215 Q. How many came to light upon such steps as you did take? A. I do not think that more than two, but I may be mistaken; I have given them so many papers in the last few days that I do not know exactly where I stand.

72

216 Q. Do you mean by your answer to state that there were certainly two, and there may have been more? Be as specific as you can. A. Well, I would not want to swear that I gave them more than one, but I think there were two.

217 Q. Whom from? A. The parties you are asking about, Coudert and Holden; I do not know which were the signers of them; they were written from that office.

218 Q. Written at what time? A. Well, before Mrs. Fayerweather's death, and I should say during the contest of the Surrogate.

219 Q. During the probate contest? A. Yes, sir, during the probate contest. There may have been some relating to remittances or something of that kind, that I have not turned over to them; I have not looked at those.

220. Have not turned over to whom?

Mr. Sherman: One minute before you answer that I want to put an objection on the record. Counsel for complainants objects to this whole line of exam-
73 ination and to the present question, on the ground that in order to have the benefit of their pleas, as pleas, these defendants must confine their proceedings thereunder to the issues raised thereby, and that the object of their plea being to avoid going into the evidence at large, the defendants, by going into the evidence at large outside of the issues raised by their pleas, waive their pleas, and can have no advantage from their pleas, except as answers; and counsel for complainants hereby gives notice to the defendants that the complainants will, at all times, insist that the defendants have by that waived their pleas, and that any further testimony outside of the issues raised by the pleas, will likewise be insisted upon to have worked the effect above stated.

74

A. To my attorneys.

221 Q. Among Mrs. Fayerweather's papers which came into your possession were there written communications from Mr. Coudert and Mr. Holden, either or both, which were not strictly letters?

Mr. Sherman: Same objection.

A. I do not recall any.

222 Q. Was there a copy of a draft of the paper which has been called a deed of gift?

Mr. Sherman: Same objection.

A. I do not recall ever seeing anything from them on that subject. I am so familiar with the deed of gift that I could not say where I had seen it.

223 Q. The question is whether you found a draft, or a copy among Mrs. Fayerweather's papers?

Mr. Sherman: Same objection.

A. I do not think I did.

224 Q. Will you state positively that you did not? A. I would not like to do so, but my best memory is that I did not.

75

225 Q. You can easily satisfy yourself upon the subject, can you not? A. No, sir.

226 Why not? A. Well, I do not think I have kept all the copies of the deed of gift since its annihilation that I have seen.

227 Q. We repeat question No. 77, which the Court instructed you to answer. It reads: "Did you appear here (referring to the place of the examination) at the last examination (meaning the occasion when you were previously examined), in obedience to a subpœna served upon you?" A. Yes, sir. Is that 76?

228 Q. 77. A. Yes, sir. Read the question again, Mr. Parsons.

76

229 Q. "Did you appear here (referring to the place of the examination) at the last examination (meaning the occasion when you were previously examined) in obedience to a supbœna served upon you?" A. Yes; I think so; I was trying to think whether we had more than one examination which referred to a preceding examination.

Mr. Sherman: That was the second day under that subpœna. The time referred to by the question is the only day:

230 Q. We repeat Question No. 78, which the Court instructed you to answer. It reads: "Did you produce at the last session (referring to the preceding session) papers called for by the subpœna?"

Mr. Sherman: It is objected to on the ground that it appears affirmatively on the record that they were not produced, that there was an objection made to their production, and the question was certified to the Court; and the question is otherwise incompetent, irrel-
77 evant and immaterial: and on the grounds stated at large as to the waiver of the plea by the course of questioning adopted by the defendants.

A. I was ready to produce them under the order of the Court or instruction of counsel.

231 Q. Be kind enough to answer the question which we put to you? A. Will you read it again?

232 Q. "Did you produce at the last session (referring to the preceding session) papers called for by the subpœna?" A. I came prepared to do so.

Mr. Sherman: Give him a categorical answer, Mr. Reynolds.

Mr. Parsons: I object to any interference with my examination, and ask the witness to answer my question.

78

The Witness: I came prepared to do so under the order of the Court and advice of counsel.

233 Q. We must insist upon an answer to the question? A. I do not see how I could make it much more definite, Mr. Parsons.

234 Q. Do you mean to say that you do not understand the question? A. I think I have given a good lucid answer to it.

235 Q. Do you or do you not understand that question? A. You may read it again. I think I do.

236 Q. "Did you produce at the last session (referring to the preceding session) papers called for by the subpœna?"

Mr. Sherman: Objected to on the ground that the question is a preposterous one, the answer to which is perfectly well known to every one present.

A. I produced everything that my counsel advised me to.

237 Q. What did you produce?

79

Mr. Sherman Objected to on the ground that the defendants, so far from observing the rule respecting the taking of testimony under a plea, so far from observing the principle that the object of a plea is to prevent the delay and expense of taking testimony at large, are not only taking their testimony at large, but are employing the time of the parties in inquiring into wholly immaterial explanations, or proving obvious physical facts occurring under their own observation, and thereby offending every principle which authorizes the introduction of a plea in an equily suit.

A. I am not ingenious enough to make any better answer, Mr. Parsons.

80

238 Q. Do you mean to say that you do not understand a question, which simply calls upon you to tell what you did produce?

Mr. Sherman: The same objection.

A. My recollection is that my counsel advised me not to produce anything.

239 Q. Did you understand that I asked you what you were advised by your counsel?

Mr. Sherman: Same objection.

A. I did not put it in just those words.

240 Q. Now will you be so good as to answer the question? A. The question is, Did I produce——

241 Q. No; the question is, What did you produce? A. I produced everything that you definitely asked me to produce.

242 Q. Before the Examiner?

Mr. Sherman: Same objection.

81

A. Yes. I was not called upon for anything definite, if I remembered right.

243 Q. When did you first have your attention drawn to Judge Lacombe's decision? A. I think in the *Law Journal;* the date is the 28th of December; probably the next day or the same day.

244 Q. Have you a copy of the decision taken from the *Law Journal* before you at the present time? A. Yes, sir.

245 Q. Do you observe that his decision requires you to answer Question 78? A. Yes, sir. What is the question?

246 Q. Do you remember that on the first occasion of your examination you produced the subpœna served upon you, and that your counsel made it part of
82 your examination? A. I did not recall that, but I believe that is the fact.

247 Q. Now, I ask you, having called your attention to the fact that the subpœna was in your possession, to answer the question which Judge Lacombe has directed you to answer, which is whether you produced the papers called for by the subpœna?

Mr. Sherman: Same objection.

A. I came here prepared to produce them as far as possible, ready to do it if I was called upon to; I did produce everything that my counsel advised me to.

248 Q. What did you produce?

Mr. Sherman: Same objection.

A. Well, I do not recall anything but that subpœna now.

249 Q. Did the subpœna call for the production of the subpœna?

Mr. Sherman: That is objected to on the ground that the subpœna is the best evidence.

83

A. I should presume not.

250 Q. Will you then be kind enough to answer the question as put, which is what you produced under the requirement of the subpœna, if anything?

Mr. Sherman: Well, the question is whether the subpœna required you to produce the subpœna, is it not?

Mr. Parsons: No; the question is what did he produce.

Mr. Sherman: That is the question which I heard and objected to. Now let that be answered before any other question is asked.

84

The Witness: Was I required to produce the subpœna, is that it?

251 Q. Will you then be kind enough to answer the question as put, which is what you produced under the requirement of the subpœna, if anything?

A. I do not know what the subpœna does require; I should presume not.

252 Q. What did you produce is the question? A. I do not think my counsel permitted me to produce anything.

253 Q. I have not asked what your counsel permitted. I have asked what you did produce, if anything, and I

want to know, as part of this question, whether in the mode in which you are now testifying in answering the question which Judge Lacombe has required to be answered, you are answering wilfully? A. Not in the least, Mr. Parsons.

254 Q. Then you will answer the question, please?

Mr. Sherman: Same objection.

A. I shall treat you with all respect, Mr. Par-
85 sons, and Judge Lacombe, and all officers of the Court, and I want to be treated in the same way.

255 Q. The respect with which you treated Judge Lacombe will be apparent by your examination. My point is that I want an answer, or I want it noted that you wilfully refuse to do so. You have the opportunity at the present time by stating what, if anything, you produced under the requirement of the subpœna? A. You know just as well as I do, and you know my answer covers it all, Mr. Parsons. I do not know how to make it any more plain to you, and I believe you know just as well as I do just what was produced, and it is all on the record. If you will write out just such an answer as you want I should make, unless it is
86 something that is evidently false, I will adopt it as my language.

256 Q. By your preceding testimony upon this subject do you mean to be understood as making the statement that you produced nothing under the requirement of the subpœna?

Mr. Sherman: Objected to as a gross abuse of the 67th Rule, as a gross perversion of the true intent and meaning of the ruling of Judge Lacombe, that being that the witness should depose whether he had appeared here ready to produce these papers, and not by calling upon him to answer whether he had produced them by the sense of presenting them in evidence; and on the

ground that this line of examination emphasizes the contention of the claim now repeated, and formerly made that these defendants have waived, their pleas by this line of examination.

The Witness: Will you put the question again?

Question No. 256 repeated by stenographer.

A. I think that was the general understanding of every one present at the time.

87

257 Q. Is it your understanding? A. I was present.

258 Q. Is it your understanding? A. Yes.

259 Q. We repeat question No. 79, which Judge Lacombe requires you to answer. It reads, "Were those papers (referring to the papers called for by the subpœna) or any of them in your possession?" and the time referred to is the time when the subpœna was served upon you.

The Witness: Now will you repeat that, please?

Question No. 259 repeated by the stenographer.

A. Yes, some of them were in my possession or under my control.

88

260. The subpœna specifies as papers to be brought with you, and produced upon your examination, any and all letters, memoranda and other paper writings whatsoever from the firm of Coudert Brothers or their office, or from any member of that firm or office, to Lucy Fayerweather, or to yourself, or to Anner Amelia Joyce, now Reynolds, or to any other person. Did you produce any such papers? A. I think my counsel had those with them that I had delivered to them, but I am not sure of it. I supposed they had.

261 Q. Now, answer directly as to the question which inquires whether they were in your possession at the time that the subpœna was served upon you.

Mr. Sherman: I repeat the objection formerly made as to the going into evidence at large, and as to the waiver by these defendants of their plea, and notify them again that the contention will be insisted upon on their persisting in that line of examination.

89

A. I do not think I then had, or now have anything from that firm, that was not in the hands of my counsel at that time, except letters referring to remittances to Mrs. Fayerweather or Mrs. Reynolds.

262 Q. Were such of the papers called for as were not in your possession in the possession of your counsel?

Mr. Sherman: Same objection.

A. I think so, all that have been preserved.

263 Q. Were they within your control? A. If counsel is subject to my control, I suppose that is the condition.

264 Q. In reading Judge Lacombe's decision, was your attention called to that part of it which says: "As to the letters to Mrs. Fayerweather from her counsel
90 giving advice or stating facts relevant to the matter in which they were retained, the same are privileged. Witness, however, must bring the papers into court, if he has them or can control them, and the Court will then decide as to any which may be submitted, whether they are or are not covered by the privilege. The defendants should not be left to the witness' determination of that question.

Mr. Sherman: Same objection.

A. Yes, sir.

265 Q. Is it before you now? A. Yes, sir.

266 Q. Have you done what Judge Lacombe said that you must do? A. I have instructed my counsel to obey the orders of the Court.

267 Q. Have you done what Judge Lacombe said you must do?

Mr. Sherman: Objected to on the ground that no occasion, opportunity or request pursuant to the Judge's order has been made; that it is not self-operative, but requires some request in order to
91 set it in motion, and, therefore, it is obvious that the witness has not done what he has not been called upon to do; and I make the same objection that I did before, as to the effect of the course of the defendants in travelling outside of the issues raised by the pleas, and taking evidence at large in the case; and again notify them that I will insist upon that contention at final hearing, and in all courts on appeal.

A. I am ready to obey that order as soon as opportunity is given me, and request my counsel to do so.

268 Q. You have already stated the time when your attention was first called to Judge Lacombe's direction, and what we wish to ascertain is whether you have complied with it or whether you have wilfully declined to comply with it, or abstained from doing so;
92 and therefore I put the question again to you whether you have brought into Court the papers which Judge Lacombe said you must bring.

Mr. Sherman: Counsel for the complainants states that he is ready to submit to the inspection of Judge Lacombe all the papers referred to in the ruling embodied in the question at any opportunity which may be afforded, and that he offers forthwith to proceed before the Court, and submit the papers referred to the inspection of the Court, and if the Court be not now able to consider the matter to attend at such time and place hereafter as the Court may indicate to be convenient, useful and necessary.

The Witness: I have lost the question now.

Question 268 repeated by stenographer.

A. I understand my counsel has the papers in our presence or in the presence of the Examiner—our presence and the presence of the Examiner. I have no desire not to obey to the letter Judge Lacombe's order, and am ready to improve the first opportunity to do so.

269 Q. Do you mean to be understood as stating to your knowledge your counsel brought those papers here?

93

Mr. Sherman: That is objected to because the subject is exhausted; and I repeat the objection and notice which I formerly gave as to the contention as to the effect of going into the evidence at large outside the pleas.

A. I cannot say by actual knowledge that I have seen the papers in the court room here this morning; I believe that he has possession of them here and now.

270 Q. What have you personally done in any effort on your part to comply with the direction of Judge Lacombe?

Mr. Sherman. Same objection.

94

A. So far as I understand the situation, I have done everything that he required of me, and if I have not I am ready to do it now.

271 Q. The question asks what have you done, what you personally have done. Be kind enough to answer.

Mr. Sherman: Same objection.

A. I have come here by order, and answered all of these questions and am ready to do anything else that is required to satisfy that order.

272 Q. And is that all?

Mr. Sherman: Same objection.

A. No.

273 Q. What else have you done?

Mr. Sherman: Same objection.

A. I have examined my letter books to get them ready to bring here, and they are ready to come at any moment; I could not bring them personally very well this morning; I tied them up for that purpose, and can have them here in a few minutes.

95

274 Q. Is that all that you have done?

Mr. Sherman: Same objection.

A. No, I have advised with my counsel to see that I was perfectly fufilling the order, and I believe that I that I have done so.

275 Q. In what you have done or failed to do under the order made by Judge Lacombe, have you acted under the advice of your counsel, that is to say, have your counsel advised you to do what you have done, and to abstain from doing what you have not done?

Mr. Sherman: Same objection.

96

A. I do not know that there is anything that I have not done. I have acted under their advice to do what the Court ordered me to do, not to abstain from doing what the Court ordered me to do. They have not advised me so.

276 Q. Is the course which has been adopted by you under Judge Lacombe's order, taken by you under the advice of counsel; have they advised you to do what you have done, and to abstain from doing what you have not?

Mr. Sherman: Objected to on the ground that these defendants first interposed to the bill of complaint herein a demurrer; that the demurrer was overruled by Judge Wheeler after six months' consideration; that these defendants thereupon answered and subsequently obtained leave from the Court to withdraw their answers and to file pleas, upon the pretense that the case was barred by said pleas, setting up only the effect of the alleged adjudication of the matters propounded by the bill, by virtue of the judgment in the so-called
97 five colleges' action; that in obtaining leave to rely upon said pleas, these defendants pretended and represented to the Court that they ought to be allowed so to plead, as a matter of favor, not then being entitled so to do as matter of right, because it would be oppressive, harsh, burdensome and expensive to compel the litigants to go into the evidence at large, and upon that pretense and claim, and upon that alone, they were allowed to file said pleas; that the matters which have been inquired of by the examination of this witness have been entirely outside, and unrelated to any question presented by the pleas, as to the existence or effect or validity of the adjudication by the five colleges' action, but have been addressed, so far as they had any legal
98 tendency whatever, to show some estoppel against the widow of Daniel B. Fayerweather, and as against the complainants in the original bill, by virtue of facts alleged or claimed to have been communicated to them, through the medium of their own counsel; that the counsel for the defendants have now occupied an hour and a half in a course of questioning of this witness—oppressive, immaterial frivolous and obviously leading nowhere, for the purpose of oppressing the complainants with the worst features of examination into the evidence at large in the cause, contrary to every principle in equity, and contrary to the 67th Rule, and contrary to the limit afforded these defendants by virtue of their pleas; and

thereupon the complainants again repeat their protest, and claim and insist that the pleas are to be taken as answers, and are waived as pleas, and are overruled by the testimony taken under them; and that the matter is at large without reference to the pleas; and that therefore this present question is incompetent, irrelevant and immaterial.

Question No. 276 repeated by stenographer.

99

A. They have advised me to obey the order of the Court implicitly, and I have undertaken to do so.

277 Q. Do you decline to make any other answer to that question? A. No I will make any other answer that I can that is more satisfactory.

278 Q. I want you to make the direct answer to it.

Question No. 276 repeated by stenographer.

Mr. Sherman: I further object to it upon the ground that it assumes without any foundation that Mr. Reynolds has abstained from doing anything.

A. They have not advised me to abstain from doing anything, and I am not abstaining from doing anything, as I understand my efforts to fulfil the order of the Court.

100

279 Q. Then, so far as you have not produced papers, it has been upon your own responsibility; is that so? A. I have produced the papers that were called for, and if you mean the letter books, I will send for them in fifteen minutes if you require them here; I will telephone for them and have them here in fifteen minutes.

280 Q. Where does the subpœna say anything about letter books?

Mr. Sherman: Same objection.

A. I should be glad if it did not.

281 Q. Where does it say anything about letter books?

Mr. Sherman: Same objection.

A. The question that I was to answer I thought called for letter books, but I may be mistaken. I do not see any letter books called for.

282 Q. Answer the question with reference to papers which are referred to in this subpœna, whether
101 in so far as you have not produced them, you have acted upon your own responsibility? A. I have produced them so far as I have possession of them, or had possession of them; they are in the hands of my counsel, ready to be produced before Judge Lacombe at the first opportunity.

283 Q. Is that the best and the only answer that you can make to my question?

Mr. Sherman: Same objection.

A. Well, I cannot think of any better way, Mr. Parsons.

284 Q. Do you desire further time to produce to the Examiner, while this examination is taking place
102 the papers called for by the subpœna? A. They were called to be produced before the Court according to that order, were they not?

285 Q. Will you answer my question, please? Do you desire further time to produce them before the Commissioner?

Mr. Sherman: Objected to on the ground that the witness has not made any such application, and that his desires in the matter are not even within the scope of examination at large in this equity suit; and on the ground that this line of examination is oppressive, burdensome, expensive, and designed to improperly affect and influence the course of the complainants in the proper and legitimate protection of their rights.

A. As I understand the matter, they are already produced before the Commissioner, and they are here under the order of Judge Lacombe.

Mr. Sherman: Counsel for the complainants has in his possession as——

Mr. Parsons: I object to statements of counsel of matters of fact. Statements of matters of fact must be under oath.

103

Mr. Sherman: We cannot both talk at once. Counsel for the complainants has in his possession as counsel for this witness, the papers required to be submitted by the Court's order to the Court, and hereby tenders them for inspection by the Court, and its rulings, as to the further use to be made of them.

286 Q. Produce them to the Examiner.

Mr. Sherman: Counsel declines to produce them to the Examiner, but will produce them to the Court upon the certificate of the Examiner. I do not know but what I will produce them to the Examiner. Do you feel qualified to rule upon the question of whether these papers come within the privilege announced by
104 Judge Lacombe in his ruling? If you feel qualified by that, I will produce them to you, or if you will certify them to the Court I will submit them to the Court.

Mr. Parsons: Mr. Shields, I am examining the witness, and I have put a question to him which has not been answered.

287 Q. Mr. Reynolds, I want you to understand that we stand upon our rights to have you answer questions put to you; that we decline to take statements by your counsel in place of your own answers; that we wish to put you in the situation either of complying personally with Judge Lacombe's order or stating that you decline

to do so; and if you decline, of stating whether you do it upon your own responsibility, or upon the advice of your counsel. The question which we ask you to answer without interference or suggestion by your counsel is that you shall produce here and now to the Examiner, the papers called for by the subpœna.

The Examiner: Now, Mr. Reynolds, answer.

Mr. Sherman: I claim the right to make response for this client as to the production of papers which are in my custody as counsel; and upon a demand to
105 produce, although addressed in form to the witness, I claim the right to respond to that demand; and I respond now as I have formerly responded, that the papers referred to are in my possession as counsel; that I am ready and desirous of submitting them to the Court for its inspection and for its determination, as to whether these papers come within the ruling of the Court, and with entire readiness on the part of my client, both as a witness and as client and party, to comply with any order that the Court may make, contending, however, that the Examiner is only the hand and not the brain of the Court, and that the Examiner has not function to pass upon that question, but only by his hand to pass the question to where the brain of the Court may pass upon it.

106

The Examiner: Well, of course, under the rule of the Supreme Court of the United States I have no power to pass upon the competency, relevancy or materiality of any question; the rules so state; that is laid down in the rules.

A. I have, I think, answered every question that I possibly could in the best way I could, Mr. Shields, and I am ready to go before Judge Lacombe. He has given me an order to do certain things, and I have done every one of them and am prepared to do every other

one to the best of my ability. Mr. Parsons' ingenious way of putting these questions is such as requires a legal mind to meet, and mine is not.

288 Q. Did you have any difficulty in understanding Judge Lacombe's decision?

Mr. Sherman: I make the same objection, and all of the objections which I formerly made, as to going at large into the evidence and as to the oppressive character of this examination.

107

A. I think I understand it perfectly. I think I have obeyed it to the letter. If I have not done so to the best of my knowledge, I am willing to do so, and improve the first opportunity of doing so.

289 Q. What we are trying to ascertain is whether you will produce to the Examiner here and now, papers which Judge Lacombe's decision says that you must produce; and we desire either that you will produce them, or that you will say that you will not produce them? A. I understand Judge Lacombe's order is to submit those papers to him, to decide whether they are privileged or not; and you are asking me to instruct my counsel to submit them to you, which is not according to Judge Lacombe's decision, as I understand it.

108

290 Q. Is that the only answer that you are willing to make to the question? A. No, I say if I am not correct, I am willing to do the thing which Judge Lacombe has commanded me to do, but that is my understanding of it.

291 Q. You decline, then, to produce them here now to the Examiner? A. I am ordered to produce them for the inspection of Judge Lacombe, as plainly as I can understand it. (Reading) "Witness, however, must bring the papers into Court, if he has them or can con-

trol them, and the Court will then decide as to any which may be submitted whether they are or are not covered by the privilege."

The Examiner: If you say you decline to produce them to the Examiner, but will produce them to the Court, get it on the record and let the Court decide. The question is whether you produce them to me now.

The Witness: Yes, they are here,

Mr. Sherman: They are produced before you now. Will you look at them?

109

The Examiner: Now let them be marked in evidence.

Mr. Sherman: They are not produced to these gentlemen; if you want that on the record, I will make it in the most emphatic form.

Mr. Parsons: Mr. Shields, we want to have your initials upon such papers as are produced.

Mr. Sherman: There is no objection to that at all.

The Examiner: I will initial them. Do you want them marked as exhibits?

Mr. Sherman: No; they are not exhibits, and may never be.

Mr. Parsons: We want to have them marked by you as papers which are produced, and we want to
110 have the witness state then that those are the only papers that he has produced, and we want the number of them stated. Keep them all in the custody of the witness, so that he may be able to answer the next question.

Mr. Sherman: I will decide that.

Papers produced and marked for identification, "J. A. S., Examiner," respectively numbers 1, 2, 3-A, 3-B, 3-C, 4 and 5.

Mr. Sherman: We produce these letters to the Examiner as complying with our understanding of the

direction of the Court, and for its inspection and ruling on the question of privilege.

292 Q. Have you noticed the papers which have now been produced and marked by the Examiner? A. I have, but I have not examined the contents of them in detail.

293 Q. Are those all of the papers called for by the subpœna or mentioned in it which, at the time that the sebpœna was served upon you or at any time since, have been in your possession or under your
111 control? Are those all. A. There is a pretty broad clause in the subpœna, I see, and I do not know whether I could say yes to that"; I supposed it was; if not, I am ready to get them altogether and bring them.

294 Q. Well, what time can you answer that question definitely? A. I should want to ask my counsel what it means. It says, "All other deeds, conveyances and writings which you have in your custody or power concerning the premises." It is so broad that I do not know what to bring under it. I have a large number of letters from different parties, from Mr. Parsons and Mr. Bovee and Mr. Ritch and my counsel.

295 Q. How much time do you want to prepare yourself to answer definitely the question which has been put to you?

112

Mr. Sherman: Objected to on the ground that the question itself is not definite or precise, and that it appears that anything that has been so specifically indicated, either by question or subpœna, as to place upon the witness any obligation whatever, has been produced.

A. If you will eliminate the letters from the parties which you do not want, I will bring those you do want, Mr. Parsons. Do you want I should bring those letters I received from you? The premises are large.

JOHN B. REYNOLDS.

296 Q. When last did you read the subpœna? A. Just now.

297 Q. Does it say anything about letters from Mr. Parsons? A. It says, "And all other deeds, conveyances and writings which you have in your custody or power concerning the premises," and I do not know what it means. I have letters from you concerning the premises, if I understand it right.

298 Q. Have you produced all the letters, writ-
113 ings or memoranda from Messrs. Coudert Brothers or their office or members of that firm to Mrs. Fayerweather? A. I think I have.

299 Q. Are you sure? A. Well, I would not want to say I have every particular item; I think I have everything of importance, and I will bring in anything ese I I have.

300 Q. When will you bring anything else that you have? A. Any time this case is adjourned to. Is there anything else except the letters from Mr. Coudert that you think this calls for that you want Mr. Parsons?

Mr Parsons: Then we will take an adjournment.

Mr. Sherman: We had not arrived at the question of adjournment. I think we ought to go on.

114

301 Q. Referring to the statement just made by your counsel, I ask you to produce these other papers now. By the other papers I mean those that you said that you would produce at an adjourned day.

Mr. Sherman: Objected to on the ground that the witness has made his offer to produce other papers dependent upon Mr. Parsons' specification of papers that he wants, that the witness is embarassed by a general printed clause in the subpœna which it is settled has no legal effect whatever and does not place any duty upon the witness without more specific description. It ap-

pears, therefore, that upon inspection of the subpœna in connection with the ruling of Judge Lacombe, the witness has fully complied with it, and that there is, therefore, no occasion for an adjournment to produce papers which he is under no requirement to produce.

A. Well, I have got a little bit confused, and I will ask you to read it again.

Question No. 301 repeated by stenographer.

A. I think I have not stated that I would pro-
115 duce any papers at an adjourned day, that I would look for them further. I do not believe I have any more papers from the office of Coudert Brothers but I will make further search for them and I will bring any ot her specific papers that I am directed to or requested to by Mr. Parsons and deliver them to Mr. Shields under the order of Judge Lacombe.

302 Q. When? Any time this afternoon after two o'clock. I think I can look through my files in that time.

Mr. Sherman: Counsel for complainants gives the counsel for the defendants notice that he will bring on
the matters certified by the Examiner, including
116 the privilege affecting the letters which have here been produced and marked, at the hearing of motions to-morrow, Friday, at two o'clock.

The Witness: Am I to answer any further?

Mr. Parsons: The question was of an adjournment, but as there seems to be an uncertainty upon the subject of adjournment I will put another question to you.

303 Q. Among Mrs. Fayerweather's papers which came into your possession under the circumstances previously stated by you, were there any writings, communications, letters or papers of any kind from Daniel G. Rollins? A. I do not recall any.

304 Q. Or from Morris B. Beardsley? A. Among her papers.

305 Q. Yes.

The Witness: Read that question again please.

Question repeated by the stenographer.

A. That is quite possible. I have not looked for them

Mr. Parsons: Now Mr. Shields, when the proceedings of to-day have been written out we shall
117 wish you to certify what has taken place as shown by the minutes, both with reference to the action of the witness and of his counsel.

The Examiner so certifies.

JOHN A. SHIELDS,
Examiner.

Adjourned to Tuesday, January 8, 1901, at 10.30 A. M.

---

118 New York, January 8, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. PARSONS, Mr. CARNOCHAN, Mr. MCLAUGHLIN, Mr. BISHOP, a representative of Messrs. NASH & JONES, and a representative of Messrs. ROOT, HOWARD, WINTHROP & STIMSON.

Continuation of the examination of JOHN B. REYNOLDS, by Mr. Parsons:

306 Q. You stated at the close of your preceding examination that you would look for further papers

between that time and the adjourned day. Have you done so? A. Yes, sir.

307 Q. For what papers have you looked? A. Further letters from Coudert Brothers.

308 Q. Have you found any? A. Yes, sir.

309 Q. What? A. I have not found them, but I have got copies of all that Mr. Coudert has ever written, from their office, and I have them with me.

Mr. Parsons—Produce them and have them marked for identification by the Commissioner.

119

Witness produces eleven papers which are marked by the Commissioner Exhibits for identification Nos. 4 to 14, both inclusive.

310 Q. Have you seen the last decision of Mr. Justice Lacombe with reference to the conduct of this examination?

Mr. Sherman: Objected to as immaterial, and because the decision is not to be proved in that manner.

A. I have not seen it.

311 Q. Have you heard it read or do you know about it?

120

Mr Sherman: Same objection.

A. I think Mr. Blaikie read it to me.

312 Q. Were you present upon this examination when there were examined on behalf of the complainants the officers of the United Dressed Beef Company?

Mr. Sherman: Objected to as immaterial.

A. A part of it, not all; I am not quite sure about the whole.

313 Q. Do you know that there is upon the calendar for trial, standing at the head of the day calendar today, a suit against the United Dressed Beef Company?

Mr. Sherman: Objected to as immaterial and as evidence at large, and as overruling the plea and as incompetent, irrelevant and immaterial.

A. I understand so.

314 Q. Did you have anything to do with the commencement of that suit?

Mr. Sherman: Objected to as evidence at large and as incompetent, irrelevant and immaterial; and I advise the witness not to answer until the Court shall have directed him to do so.

121

The Witness: Under advise of counsel I decline to answer.

315 Q. Why do you decline to answer? A. Because my counsel so advises.

316 Q. Is that the only reason? A. Yes, sir, except such reasons as he may have to give me for his advice.

317 Q. In what pending litigation concerning the estate of the late Daniel B. Fayerweather have you taken an active part?

Mr. Sherman: Objected to as evidence at large in the cause, as overruling the plea, as incompetent, irrelevant and immaterial, and as privileged.

122

The Witness: Shall I answr?

Mr. Sherman: I advise the witness not to answer until the Court shall instruct him to do so.

The Witness: Under advice I decline to answer.

318 Q. Are you aware that suit against the United Dressed Beef Company goes upon the claim that Mr. Fayerweather's nieces, as heirs at law, became entitled to the property which is the subject of this action, and that his will did not operate in respect of it?

Mr. Sherman: Objected to on the ground that the question calls for evidence at large in the cause and overrules the plea, and on the ground that the opinion of the witness concerning the grounds or merits of the controversy between other parties is not evidence.

Mr. Parsons: Answer, please.

A. I do not think I could be competent to give a full answer to that question.

319 Q. Answer it as far as you can.

Mr. Sherman: Same objection.

123

A. I suppose they are making the claim as heirs of Mr. Fayerweather.

320 Q. Don't you know that?

Mr. Sherman: Same objection.

A. Yes, I know that.

321 Q. Do you know about a suit which has been brought against Mr. Fayerweather's executors and others, claiming a number of millions of dollars as damages? A. Yes, sir.

322 Q. Did you have anything to do with the commencement of that suit? A, Yes, sir.

124

Mr. Sherman: I wish you would give me an opportunity to make objection, that would be the usual way.

The Witness: Excuse me.

323 Q. How many such suits are there, if more than one?

Mr. Sherman: Objected to as evidence at large in the cause and as incompetent, irrelevant and immaterial.

The Witness: Shall I answer?

Mr. Sherman: I have no objection to your answering at present.

A. Three, I think.

324 Q. Do they go upon the claim that in some way Mr. Fayerweather's estate has been lost to his next of kin?

Mr. Sherman: Objected to on the ground that the query is an abuse of the 67th Rule, that it is the attempt of the defendant in the actions to exploit and ascertain the grounds of the accusations against him and to secure a disclosure in advance of the period when he was entitled to any such disclosure of the grounds
125 and the evidence which may be or will be deduced against him, the fact being that the examining counsel is one of the defendants in said action. I advise the witness that he is privileged from disclosing to the defendant such matter, and I advise him to decline to answer until the Court shall instruct him to the contrary.

Mr. Parsons: Counsel for the defendants states that the object of this examination is to show that neither the present suit nor either of the other inconsistent suits is brought in good faith, that they recognize that this testimony is irrelevant to the claim of estoppel by the judgment in the five colleges' suit, and that if counse for the complainants are willing to limit the testimony to testimony which is relevant to that issue, they are willing to do so; otherwise, under the ruling of
126 Judge Lacombe, they will feel constrained to conduct the examination beyond that issue.

325 Q. Is it not the fact that at the present time there are pending three series of suits, each brought through your instigation and each proceeding upon a claim inconsistent with the others. First, this suit, the suit in which the examination is being conducted, which proceeds upon the claim that Mr. Fayerweather did make a will, that its provisions rested upon a claim of secret trust, which was invalid, and for that reason his widow and the next of kin are entitled to a share of his estate. Next, the suit against the United Dressed Beef

Company, which proceeds upon the idea that Mr. Fayerweather left no will and that persons claiming to be his heirs at law are entitled to his estate; and, third, a suit for damages, which proceeds upon the claim that Mr. Fayerweather's estate has been lost to his widow and next of kin, and lost by the responsibility of persons who are being sued for damages to the amount of many millions of dollars in consequence?

Mr. Sherman: Objected to on the ground that by no possible conception of the idea of legal evidence
127 could the opinions called for by this question come within the rule of Blease against Garlington or the ruling of the Circuit Judge, and that the queries are a gross and impertinent abuse of the 67th rule, and that power which for proper purposes the Court confers upon its counsel in the examination of witnesses under the 67th rule.

Mr. Parsons: The counsel for the defendants repeats the object of this examination is to show that the pending litigation has been instigated by the witness and that it is brought for ulterior purposes and not in good faith. We repeat, also, that we recognize that this line of examination is not relevant to the issue presented by the special plea and that if the counsel for the complainants are willing to limit the testimony to
128 testimony relevant to that issue they are willing to do so, but that, on the contrary, if the counsel for the complainants insist that it is incumbent to introduce all the evidence bearing upon the claim made by the complainants in this suit and at this time, then they will claim that this testimony is competent. They will abstain at the present time from pursuing this line of inquiry until they ascertain what course will be pursued by the counsel for the complainants, being willing to stipulate out of the case irrelevant testimony taken for the complainants and any other testimony on either side as to which counsel will not claim that it is relevant to the issue presented by the special plea.

Mr. Sherman: Counsel for the complainant responds to the last statement that such evidence as is being adduced on behalf of the complainant is presented pursuant to the deliberate conception of what evidence it is immaterial, competent and proper to adduce in support of the bill of complaint and the cross-bill; that the opinion which counsel for the defendants expresses obviously arises from a lack of knowledge of the scope and nature of a suit in equity, of the proper function of pleadings in equity, of the proper operation and application of the 67th Rule in equity;
129 and Counsel for the complainants further states that the hardly veiled intimidation contained in the statement of the counsel that he is deliberately proceeding outside of what he knows to be the issues and of the plea for the purpose of supporting his claim that this witness has been guilty of fraud and crime does not commend itself to counsel for the complainants as a reason why the complainant should submit and yield to the opinion and misconception of the counsel for the defendants heretofore stated. And in as much as the avowed purpose of this line of questioning now appears to be to convict this witness out of his own mouth of offenses under the Penal Code of this State and offenses at common law and other matters which would, if true, subject him to a penalty,
130 I advise the witness that he is privileged from answering any such inquiry, and advise him, therefore, not to make answer to the last question.

The Witness: Under advice of counsel I decline to answer.

326 Q. Have you been guilty of offenses under the Penal Code?

Mr. Sherman: That is objected to as obviously improper and the answer obviously privileged.

327 Q. Have you been guilty of fraud or crime in connection with this litigation?

Mr. Sherman: Same objection. I advise you not to answer questions of that kind, Mr. Reynolds.

328 Q. Did you hear the objection just made by your counsel upon the score of privilege? A. Yes, sir.

329 Q. Do you know what he means, what privilege?

Mr. Sherman: Objected to on the ground that the witness is entitled to act upon the privilege
131 stated for him by his counsel without further defining it. I therefore advise him not to answer.

330 Q. Do you claim privilege upon the ground that the answer to the question or questions put to you might tend to degrade you?

Mr. Sherman: I advise the witness not to answer for the same reason.

331 Q. Or to convict you of crime?

Mr. Sherman: Same objection and same advice.

332 Q. Or of fraud?

Mr. Sherman: Same objection and same advice.

132

Adjourned to January 9, 1901, at 2 P. M.

JOHN B. REYNOLDS.

NEW YORK, January 9, 1091.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. BLAIKIE, Mr. PARSONS, Mr. STIMSON, Mr. BOVEE, Mr. BISHOP, Mr. CARNOCHAN and Mr. MCLAUGHLIN.

Continuation of the DIRECT-EXAMINATION of JOHN B. REYNOLDS:

133

By Mr. Parsons:

333 Q. Do you recall that when you were last examined as a witness your counsel took objections to questions put to you upon the ground that they bore upon a suit or action which he described as having been brought against "him" apparently referring to Mr. Parsons, who is conducting your examination? A. I think I do.

334 Q. Do you know the suit to which your counsel referred? A. Yes, sir, I think I do.

335 Q. Is it a suit purporting to be brought for damages in the sum of many millions of dollars
134 against the executors of Mr. Fayerweather, joining as a party defendant their counsel Mr. Parsons?

Mr. Sherman: Objected to on the ground that the matter is evidence at large, and not even relevant or material to any issue in the cause even as evidence at large, and as wholly incompetent, inasmuch as of necessity the complaint in the action will specify what it was for, and no pretense of an excuse is alleged for not giving the best evidence on the subject.

Mr. Parsons: Answer.

The Witness: Read the question again, please

Question No. 335 repeated by the stenographer.

A. Yes, with others I think.

336 Q. Speak a little louder, please? A. I think so, with others.

337 Q. Have you any doubt about it? A. No, I have not.

338 Q. Did you not direct the suit to be brought?

Mr. Sherman: Objected to as incompetent, irrelevant and immaterial, as not evidence in the cause, as a gross abuse of the 67th rule for the ulterior purposes of counsel examining, who is himself a defendant
135 in the cause referred to, for the purpose of exploiting the plaintiff's case in that action under the pretext of examining the witness in this equity cause, and on the ground that the witness is, as plaintiff in the suit referred to, privileged from making any such disclosure under the circumstances. I, therefore, advise the witness not to answer the question.

The Witness: Under the advice of counsel I decline to answer.

339 Q. What do you understand the counsel to mean by privilege as stated by him in his last speech or statement or whatever it may be?

Mr. Sherman: Objected to upon the ground that the complainants in this cause do not attend for the
136 purpose of hearing impertinent comments by counsel for the defendants upon their contentions or objections, as a gross abuse of the mere physical opportunity for the counsel for the defendants to place such observations upon the record, and as being impertinent and scandalous. I advise the witness that, having taken the position of privilege, he is not called upon to define it further to this counsel, and I therefore advise him to decline to answer.

The Witness: And I do so decline.

340 Q. (Handing paper.) Look at the paper which I now hand you and tell me whether you recognize the handwriting, and if so by whom was it written?

Mr. Sherman: Let me see it before you answer the question.

The Witness: Here it is.

Mr. Sherman: (After examining paper.) No objection.

The Witness: What is the question?

Question No. 340 repeated by stenographer.

A. I recognize the writing. It was written by myself to Mr. Parsons.

341 Q. It purports to be dated January 30, 1900,
137 and to be addressed to Messrs. Parsons, Shepard & Ogden, 111 Broadway, New York; was it written at that time?

Mr. Sherman: Objected to on the ground that the letter itself is the best evidence of its contents and that the counsel cannot, withholding the letter, interrogate as to its contents. I further object to it as incompetent, irrelevant and immaterial, and as evidence at large in the cause.

Mr. Parsons: The question is whether it was written at that time?

A. Well, I should presume so, I could not say without looking at my—I do not think I could answer.

342 Q. Was it written in answer to a communication to you from Messrs. Parsons, Shepard & Ogden,
138 bearing date January, 1900, or thereabouts? A. What is the date of this?

343 Q. (Handing paper.) Perhaps that will refresh your recollection.

The Witness: What is the question?

Question No. 342 repeated by the stenographer.

The Witness: Yes, sir.

Mr. Sherman: I ask the Examiner to mark for identification the letter which has been shown the witness.

Mr. Parsons: Counsel for the defendants acquiesce in the wish of counsel for the complainants that the letter be marked for identification. They do not surrender

possession of the letter, and yet have it marked for that purpose.

The paper was marked Exhibit No. 1 for identification, January 9, 1901, C. B.

344 Q. Did the suit referred to allege a conspiracy and make charges of fraud and forgery, and was it commenced by an unverified complaint, and did you procure the publication in the newspapers of statements in reference to it simultaneously with the filing of the complaint?

139

Mr. Sherman: Objected to as evidence at large in the case, as an abuse of the 67th Rule, to enable a defendant in an action for damages to exploit the case of the plaintiff in advance of the trial, as embodying several different questions which cannot be answered singly, and as secondary evidence of the contents of the complaint, which is in the power of the defendants to produce and which they withhold.

Mr. Parsons: The counsel did not instruct you to decline to answer.

Mr. Sherman: I have not this time.

140

The Witness: Now read it again, please, Mr. Stenographer.

Question No. 344 repeated by the stenographer.

A. Well, I should have to answer yes and no to that.

345 Q. Can't you be more definite? A. If you can ask your question separately I will answer each one.

346 Q. What did you have to do or know about the simultaneous publication in the newspapers of the charges of that complaint, I mean by simultaneous, simultaneous with the filing of it, when it was an *ex*

parte, unverified document placed upon the files of the Court by your authority?

Mr. Sherman: Objected to upon the ground that the question is evidence at large in the cause, and as such incompetent, irrelevant and immaterial, that it assumes as a fact what is not even by a scintilla of evidence established; because it is a gross abuse of the 67th Rule in equity and is designed to exploit at once the curiosity of the defendant in the action respecting the case
141 and his temper, which appears to be excited by the occurrences.

Mr. Parsons: Counsel for the defense repeat the stipulation which they have time and time again given, and which is that if testimony is to be limited to the issue, and the only issue which they now understand to be before the Court, that this and all other irrelevent testimony is to go out of the case.

Mr. Sherman: Counsel for the complainants, in reply to the suggestion of the counsel for the defendants, states that the course which the counsel for the defendants has adopted in going into evidence at large in the cause whereby he has overruled his plea and justified the complainants, if they were not before justi-
142 fied, in going into evidence at large, and whereby he has abandoned his position of *res adjudicata*, cannot be cured by any consent or stipulation which the complainants will make relieving them from the situation which he has placed himself and his clients in.

Mr. Parsons: To prevent any justification for the assertion that counsel for the defense are in any way responsible for the irrelevant testimony which has been elicited, they waive an answer to this question, and have no further questions to put to the witness.

Mr. Sherman: I will cross-examine the witness.

CROSS-EXAMINATION by Mr. Sherman;

347 x-Q. Mr. Reynolds, are you the executor of Mrs. Lucy Fayerweather? A. Yes, sir.

348 x-Q. Did that lady die in your house at Rutland, Vermont? A. Yes, sir.

349 x-Q. Were you then married to her sister? A. Yes, sir.

350 x-Q. Her sister is now your present wife? A. Yes, sir.

351 x-Q. The other persons who have commenced
143 suits which are referred to by Mr. Parsons, are they nieces of Mr. Fayerweather? A. They are.

352 x-Q. That is to say, Mrs. Mary W. Achter and Miss Emma S. Fayerweather? A. Yes, sir.

Mr. Parsons: We object to any testimony by this witness about these persons being the nieces of Mr. Fayerweather. He is not shown to have any knowledge upon the subject or to be competent to testify.

Mr. Bovee: We ask that objection to be noted before the answer to the previous question.

Mr. Sherman: Oh, no; it will be noted when it is uttered.

353 x-Q. Did Mrs. Fayerweather in her lifetime cause an action to be brought against these same de-
144 fendants who are defendants in this suit, wherein she prayed that she might be relieved from the alleged settlement made with her of her interest as widow of Daniel B. Fayerweather?

Mr. Bovee: One moment. That is objected to. If there was such an action commenced the pleadings themselves are the best evidence.

Mr. Parsons: We ask that they may be produced.

Mr. Sherman: Answer it.

A. She did.

354 x-Q. Later was the complaint in that action amended so as to join Mrs. Achter and Miss Emma S. Fayerweather as complainants with Mrs. Lucy Fayerweather?

Mr. Parsons: Objected to on the ground that there is no evidence yet to warrant such a complaint, and as matter of fact we are informed that there never was.

A. That is my memory.

355 x-Q. Was that suit commenced as early as December, 1892?

145

Mr. Parsons: Objected to on the ground that the witness is not shown to have any competent knowledge of when it was commenced, and that the period of its commencement can only be proved by producing papers, and by competent testimony as to the time when they were served and the persons upon whom they were served.

Mr. Sherman: I will change that date to July 11, 1892.

The Witness: Read the question now, please (Question No. 355 as amended read by stenographer.)

A. That is my recollection of the date.

146

356 x-Q. Among others did Parsons, Shepard & Ogden appear for the defendant in that suit? A. Yes, sir.

357 x-Q. Did they interpose an answer on behalf of certain defendants——

Mr. Parsons: We object.

Mr. Sherman: Let me finish the question.

Mr. Parsons: Certainly.

357 x-Q. (Continued)—including Mr. Bulkley and Mr. Vaughan?

Mr. Parsons: We object upon the ground that if there were an answer, the answer itself is the best evidence, or a copy of it. We object that the question assumes that there was a complaint by Mrs. Fayerweather, but there is no evidence that such was the fact. The best evidence, if such were the fact, would be the production of the complaint; and in support of our objection we state that no such complaint was ever
147 seen or known to exist by us. We do not believe that there ever was such a complaint, a complaint by Mrs. Fayerweather, notwithstanding the fact that the witness has sworn that there was.

The Witness: I do not think that I have sworn to any such thing, and I would like to have my answer read, the question and the answer.

(Question No. 357 repeated by stenographer as follows: "Did they interpose an answer on behalf of certain defendants, including Mr. Bulkley and Mr. Vaughan?")

Mr. Sherman: In that suit I mean.

148

A. Yes, either that or the revival of it.

358 x-Q. After Mrs. Fayerweather's death you were appointed her executor and revived this suit, did you? A. Yes, sir.

359 x-Q. And to the complaint as amended, with the two nieces as plaintiffs and with you as a plaintiff, was there any answer interposed on behalf of Bulkley and Vaughan by Parsons, Shepard & Ogden?

Mr. Parsons: One moment.

A. Yes, sir.

Mr. Parsons: We object upon the ground that the best evidence consists in the papers themselves, the answer and the assumed complaint, and if they are produced it will appear that there is no justification for any statement by the witness that there was a complaint by Mrs. Fayerweather or an answer to it, notwithstanding the witness' testimony to the contrary.

Mr. Sherman: There is no testimony to the contrary.

I do not ask you to answer Mr. Parsons' ques-
149 tions, Mr. Reynolds. I am going to ask you questions that I beg you to answer without reference to Mr. Parsons' comments.

358 x-Q. Now, was Mr. Parsons himself in Court in that action on one occasion before Mr. Justice Lawrence, and did he unite in a motion to dismiss that suit for want of prosecution or for some other reason, and was that application granted? Yes, sir.

359 x-Q. A short time after the entry of the judgment dismissing that complaint, was the so-called five college action begun? A. Yes, sir.

360 x-Q. Were you, as executor of Mrs. Fayerweather, and the nieces who have been your co-complainants in the suit dismissed before Judge
150 Lawrence, made defendants in the five college action within two or three weeks after the discontinuance of your action?

Mr. Parsons: We object upon the ground that the best evidence about such suits consists in the papers and in the direct evidence as to the time when the papers were served, the dates of the occurrences, and object to it as incompetent.

361 x-Q. Mr. Reynolds, in view of the objection, I ask you if you recall the fact that, upon your direct-examination, Mr. Parsons insisted upon your answering as to the contents and effect of a complaint which he represented to have been served upon the executors,

and that he ignored my objection that he ought to produce or account for that complaint, and thereby waived his objection?

Mr. Parsons: I object, further, that the witness is incompetent to tell whether I did or not waive an objection. But I do not stand upon my objection so far as to instruct the witness not to answer.

A. I think that is my recollection of the question, and I think I was advised not to answer.

151

362 x-Q. You were advised by Mr. Parsons not to answer?

The Witness: Strike that out.

Mr. Parsons: Louder, please.

The Witness: Just stop interrupting me and you will be treated with proper respect, Mr. Parsons.

Mr. Parsons: Raise your voice; we want to hear.

The Witness: Lower yours and you can hear what somebody else says. I will give you all you want here before I get through with you on all subjects.

Mr. Parsons: I want to hear whatever you say.

363 x-Q. Mr. Reynolds, did the complaint in the ac-

152

tion brought first by Mrs. Lucy Fayerweather, revived by you as her executor and to which Parsons, Shepard & Ogden interposed answers on behalf of Bulkley and Vaughan, contain substantially the charges of fraud and crime which are set up in the cross-bill in this suit as ground for equitable relief.

Mr. Parsons: Objected to upon the ground that the papers themselves are the best evidence of their contents; that this question does not even ask the contents.

A. Yes, that is my recollection of it.

364 x-Q. At the time that suit was abandoned did you have within your own knowledge, possession or control the evidence in support of such charges which you now have in your knowledge, possession and control?

Mr. Parsons: I would like to have that question read.

Question No. 364 repeated by stenographer.

365 x-Q. And all of them?

153

Mr. Parsons: I want that read. I may want to object to it.

Question 364, as amended by Question 365, repeated by stenographer.

A. No, sir; only a part of them.

366 x-Q. At the time you advised the plaintiffs in the suits for several millions of dollars of damages to begin those suits, and at the time you brought your suit of that character, did you have in your possession, power and control, or did you believe that you had, evi-

154 dence which would fully substantiate all the charges therein made against all the defendants therein named? A. I did.

367 x-Q. Was Mr. John E. Parsons one of those defendants? A. Yes, sir.

Mr. Parsons: One moment. I think we will take an objection to that before the answer is given. Read the question, please—the question preceding the last.

Question No. 366 repeated by stenographer.

Mr. Parsons: We object to the line of examination, to the preceding question and this question. We object that the question is incompetent, irrelevant and immaterial, and that if the witness has any such evi-

dence as is inquired about he is to state it and put it upon the record, and is not to state any conclusion which he sees fit to draw from it; that it is entirely immaterial what he believes, the question is what he can produce.

Mr. Bovee: And we move to strike out the answer of the witness as premature to the objection.

368 x-Q. Have you fully answered, Mr. Reynolds? A. I think so.

155

Mr. Sherman: Read the answer.

The answer to Question No. 367 was repeated by stenographer.

369 x-Q. Did you bring your suit or advise anyone to bring a suit against Mr. Parsons or against any of the defendants in those suits or in this suit in bad faith, without a belief in the justice of the cause and without a belief that you could substantiate it as far as you were concerned, or did you bring any such suit, or advise any such suit for ulterior purposes or for any other purpose than to seek the judgment which you therein demanded?

156

Mr. Parsons: Objected to as leading and as incompetent, irrelevant and immaterial, and asking conclusions and not inquiring about facts.

A I believed it fully then and I believe I am able to produce evidence that will sustain every charge.

370 x-Q. Was it in your mind when you advised the bringing of those suits and brought that which you brought that by an apparently valid codicil executed by Mr. Fayerweather on his dying day, whatever infirmity might have existed temporarily previously in the title of Bulkley, Ritch and Vaughan, as executors of

the estate of Fayerweather, that title had been reinstated and reaffirmed by that codicil, or that, to be more accurate, that was the supposition at the time of the execution of the releases by Mrs. Fayerweather and the next-of-kin on or about June 12, 1891?

Mr. Parsons: Objected to upon the ground that what is in the mind of the witness or the suppositions of the witness are entirely incompetent, irrelevant and immaterial, that if the witness can vindicate the good faith of his participation in the Fayerweather litiga-
157 tion he is to do it, not by stating conclusions, but by producing evidence of facts; that if he claims that at a particular period he was in possession of information different from what was the case at a different period, he is to state what information or evidence he had at one period, or what information or evidence he had at the other, and is not to draw conclusions of the character asked for.

Mr. Sherman: Now, hear the question read and answer please.

Question No. 370 repeated by stenographer.

The Witness: That is a pretty long question.

Mr. Sherman: The question is, whether that was in your mind at the time.

158

Mr. Parsons: We object that that is a perversion of the question. The question asks, first, what was in the witness' mind, and then says, "to be more accurate," and substitutes something else about suppositions.

Mr. Sherman: I trust you will take my questions, Mr. Reynolds, and not Mr. Parsons' perversions of them.

The witness: Yes, but I want to be sure that I understand your question, Mr. Sherman. It is a long one.

Mr. Sherman: Read it.

Question No. 370 repeated by stenographer.

The Witness: You need not take this down.

Mr. Sherman: Don't say that; Mr. Parsons insists upon its going down. If you cannot answer the question say so.

A. If you refer to the first case which was brought, which I suppose you do, answer yes.

371 x-Q. At the time you brought your action and advised, so far as you did advise, the bringing of the other actions, did you have in mind and were you informed and did you believe that the obtaining of the releases from Mrs. Fayerweather, Miss Emma S. Fayerweather and Mrs. Mary W. Achter, was secured by representations that the residuary clause in the first codicil to Mr. Fayerweather's will as reaffirmed andamended by the dying-day codicil was an absolute devise not subject to any trust or any qualification; that the executors insisted through the course of the contest which occurred in the Surrogate's Court that the devise to them was absolute and not subject to any secret trust; that the will and codicils were free from any infirmity, either of law or of fact, as to the genuineness of the execution and signatures thereof and as to the legal validity thereof, and that it was not disclosed prior to the releases being executed that the dying day codicil, as Mr. Vaughan represented subsequently to the execution of the releases, drawn following instructions given by Mr. Fayerweather to Vaughan on the morning of November 15, 1890, and that Mr. Vaughan had expressed the fact of having received said instructions in the Surrogate's Court; that Mr. Vaughan subsequently produced an envelope, upon the back of which he, as he subsequently deposed, had written instructions taken down from Mr. Fayerweather's lips on the morning of November 15, 1890, to which instructions the codicil drawn on that day did not in any respect conform; that Mr. John E. Parsons had in his possession during negotiation for the settlement with Frederick R. Coudert

159

160

and Daniel G. Rollins the knowledge and information from Mr. Vaughan that such instructions had been given, and had in his possession or power or under his control the said envelope upon which were written those instructions; that he did not disclose that fact or the fact of the instructions to Mr. Coudert or to Mr. Rollins; that he procured and brought about the settlement which eventuated in the releases, knowing that Mr. Coudert and Mr. Rollins were ignorant of the circumstances of the instructions and the
161 existence of the envelope; that the existence and effect of the envelope and of the instructions which it embodied were material and important as evidence bearing upon the integrity of the dying-day codicil, its good faith and the genuineness of its signature; and did the disclosure of that envelope and those circumstances regarding the instructions, in contrast and comparison with the facts and evidence which had previously been developed in the Surrogate's Court, together with other circumstances which came to your knowledge and information, convince you, and in advising such suits as you did advise, and in bringing such suits as you did bring, did you have these things in mind, leading you to think that these suits that you brought
162 were properly brought and well brought for the purposes demanded in the prayer for judgment?

Mr. Parsons: Do not answer.

A. Yes, sir.

Mr. Parsons: I insist that the witness shall withhold his answer until we can state our objection. I call the attention of the Examiner to the fact that the witness persistently answers questions of this kind knowing of our desire to object and of not having opportunity to do so.

Mr. Sherman: I insist that counsel shall proceed to take his objection instead of making a speech about his intention to make an objection. I hope you have

got that on the record. We are waiting the statement of an objection. I ask the Examiner to take notice that it is now twenty-five minutes of five and that we will wait ten minutes to get the objection.

Mr. Parsons: State on the minutes that there are some counsel with whom we refrain from having discussions. I desire to take my objection, and the objection to the question is this, that it is immaterial and irrelevant what may have been in the mind of the witness, what information he may have received;
163 that the whole inquiry is incompetent, the question is grossly leading, purposely designed to obtain an affirmative answer to a long series of propositions, and that it is scandalous; and we move that the preceding testimony upon this subject be stricken out, and shall call the attention of the Court to the abuse which we claim to be taken of the proceeding before its Examiner.

Mr. Sherman: We will.

The Witness: I make the same answer that I did, that Mr. Parsons objected to, "Yes, sir."

372 x-Q. Did you believe when you brought these actions, such actions as you did bring, and advised such actions as were brought, that the advice under which the nieces and Mrs. Lucy Fayerweather
164 made the settlement and executed the releases and which was given to her by Mr. Coudert and to them by Mr. Rollins or Mr. Beardsley, were based upon a frank, full and truthful disclosure to them of the material——

Mr. Parsons: We want to object.

Mr. Sherman: Let me finish.

(372 x-Q. continued.)—of the material facts and all of them which could have any bearing upon their rights and their ability to enforce their rights if they should continue a contest?

Mr. Parsons: We object upon the grounds previously stated, and furthermore upon the gronnd that there is

no evidence of any advice given by Mr. Coudert or by any one, and that to a question asked by the defense with reference to such advice objection was made that the question was privileged, and that objection, upon the insistence of the counsel for the complainants, was sustained by his Honor, Mr. Justice Lacombe.

The Witness: Will you read the question?

Question No. 372 repeated by stenographer.

165

A. I suppose this question to be a reference to the first suits.

373 x-Q. The time of the releases the question refers to, whether at that time these conditions were believed to have existed by Mrs. Fayerweather and the nieces?

Mr. Parsons: The same objections, and the special objection that the belief of the witness is incompetent, irrelevant and immaterial.

A. Yes, sir.

374 x-Q. When you brought such actions as you brought or advised such actions as you advised should be brought, did you have in mind that the devel-
166 opments of the Five College Action and the testimony therein disclosed and the exhibits there produced, especially by Mr. Vaughan, showed that the dying-day codicil, instead of conforming to any wish ever expressed beforehand by Mr. Fayerweather, utterly ignored and nullified the instructions which Mr. Vaughan avowed in the Five College Action had been given by Mr. Featherweather to him on the morning of November 15, 1890, in order that a codicil might be made embodying those instructions.

Mr. Parsons: Same objections.

The Witness: Now please read that question.

(No 374 repeated by stenographer).

A. Yes, sir.

375 x-Q. Did it seem to you material and important, and did it enter into your mind in deciding to bring the actions which you brought and in advising the bringing of the actions which you advised to be brought, that a codicil which gave to Ritch, Bulkley and Vaughan, share and share alike, a residuary estate amounting to about three millions of dollars, as absolute de-
167 visees without any restriction or trust, and which they claim to be so absolute, and which they endeavored to support by procuring an adjudication concerning the collateral inheritance tax upon their oath that the same was an absolute devise to them in their own right and not subject to any trust, and which codicil conflicted with the previously known declarations of Mr. Fayerweather made in the last week of his life that he never wished to see Mr. Thomas G. Ritch again, that he desired to and did secure from him the return of his will and codicils theretefore made which had previously been in Mr. Ritch's possession since their execution, and which codicil was in conflict with Mr. Fayerweather's previously expressed intention in substance to displace Mr. Ritch as his executor and never would have any-
168 thing more to do with him nor to see him again, and which codicil it was claimed was presented to Mr. Fayerweather on his dying day by two of Mr. Ritch's clerks, while at the same time Mr. Ritch was forbidden Mr. Fayerweather's house and had appealed to see him, upon which appeals Mr. Fayerweather had refused to see him —I say, did it seem to you material or important that there was added to these circumstances previously known the additional circumstance that the dying day codicil was introduced to Mr. Fayerweather, pretended to be executed in pursuance to Mr. Fayerweather's instructions to Mr. Vaughan, and that in all respects that codicil disregarded and nullified those instructions?

Mr. Parsons. We object upon the grounds which have been previously stated, and we object to this and all similar questions in so far as they assume facts, the ground of that objection being that there is no evidence that there is any truth in the statements, there is no evidence of any justification for making them, there is no evidence in the record from beginning to end which lays or furnishes any foundation for the attempt to put scandalous matter of this kind upon the record.

169

Mr. Sherman: Please answer, Mr. Reynolds.

The Witness: Read the question, please.

Question No. 375 repeated by the stenographer.

Mr. Parsons: In my objection before scandalous I want to add untrue, making it "untrue and scandalous."

A. Yes, sir.

376 x-Q. When did you first become aware of the fact that Mr. Parsons, acting as counsel for these executors in the settlement and negotiating with Mr. Coudert, had had in his possession this envelope of instructions marked O—A., being all the time aware of the facts as stated by Mr. Vaughan in reference thereto——

170

Mr. Parsons: Do not answer this.

(x-Q. 376 continued)—and that he had withheld the exhibit and information about it, and obtained and brought about the settlement knowing that the counsel for the other side, that is, for the widow and nieces, were unaware of the circumstances at the time concerning that exhibit?

Mr. Parsons: If the question is complete we desire to object.

Mr. Sherman: That is the question.

Mr. Parsons: Read it, please.

Question No. 376 repeated by the stenographer.

Mr. Parsons: Objected to on the ground that there is not a scintilla of evidence in support of the assumptions of the question; that the subject is irrelevant; that it is immaterial when the witness did or did not become aware in respect of matters the existence of which can be proved, and that there can be but one object
171 in the question, and that is to put scandalous matter upon the record which is untrue and known to be untrue.

Mr. Sherman: The counsel for the complainants protests that the declarations not under oath of the counsel for the defendants that the facts embodied in the question are untrue is an improper and wholly abortive method of dealing with the fact and not within the province of the objection. Now will you answer the question, please?

A. I first learned of it from Mr. Parsons' own mouth when he testified before Charles W. Dayton on the accounting, the date I cannot remember, but the minutes are in the Surrogates' Records, I think.

377 x-Q. The Dayton Record? A. I think so.

172

Mr. Sherman: I now apply to the Examiner for an adjournment for further cross-examination of this witness to Friday morning at 11 o'clock.

Mr. Parsons: We do not object to an adjournment of the proceeding until Friday at 11 o'clock. The statement that this is cross-examination we leave to be determined by the nature and the character and the mode in which the examination is conducted; we do not accept the counsel's statement that this is cross-examination.

Adjourned to January 11, 1901, at 11 A. M.

JOHN B. REYNOLDS.

NEW YORK, January 11, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. PARSONS, Mr. BOVEE, Mr. CARNOCHAN, Mr. MCLAUGHLIN, a representative of Mr. Kiddle, a representative of Root, Howard, Winthrop & Stimson, and a representative of Nash & Jones.

173

Continuation of the EXAMINATION of JOHN B. REYNOLDS.

By Mr. Sherman:

378 x-Q. Mr. Reynolds, is the disclosure made by Mr. Parsons, concerning his relations to the instructions given by Mr. Fayerweather to Mr. Vaughan on the 15th of November, 1890, in relation to a future codicil and his possession or control of the envelope marked O-A, upon which those instructions were noted by Mr. Vaughan, and which you have deposed you had in mind in bringing or advising suits, contained in the record in the New York Surrogate's Court in the matter of the judicial settlement of the account of proceedings

174 Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, as executors of the last will and testament of Daniel B. Fayerweather, filed September 8, 1896, in whole or in part?

Mr. Bovee: Counsel for the defense object to the question and to the line of the examination upon the following grounds:

First, that it is irrelevant to the issue presented by the special plea; that as to similar questions Judge Lacombe has stated it to be his opinion that they are irrelevant, and that under the circumstances to pursue the inquiry is disrepectful to the Court, and wholly indefensible and not justified.

Second, that so far as the question makes assumptions, they are wholly unproved, and as the defendants' counsel maintain are incapable of proof; and that the manifest purpose is, under the pretense of questions, to put unfounded and abusive statements upon the record, and that is wholly indefensible and unjustifiable.

Third, the defendants' counsel reiterate the stipulation which they have heretofore tendered to remove all irrelevant matter from the record, and they
175 protest and object against being put to the necessity of introducing irrelevant testimony or of leaving unanswered statements which are unproved and are absolutely denied.

And upon the further ground that the record in the Surrogates' Court is the best evidence of what transpired there.

A. Yes, sir.

379 x-Q. Were you present at the taking of testimony before Hon. Charles W. Dayton, Referee, in that matter commencing on the 1st of November, 1895, and especially on the 26th day of December, 1895? A. I think I heard the whole of that tes-
176 timony, I am quite confident that I was present at every hearing.

380 x-Q. Did you hear Mr. Parsons asked these questions, and did you hear him make these answers at page 336 of that record:

"Q. Were you not aware at the time of that "deed of gift that beside the will and codicils "you refer to there were certain memoranda "signed by Mr. Fayerweather and in the pos- "session of one of these executors? A. I do not "remember where the memoranda were or in "whose possession; I know that one that I re- "garded of the greatest importance was in my "possession.

"Q. What one was that? A. That was a mem-
"orandum made by Mr. Vaughan in substantially
"~~virtue~~ the last interview that he had with Mr.
"Fayerweather, in which Mr. Fayerweather, ac-
"cording to my understanding, told him that so
"far as he, Mr. Fayerweather, had any wishes on
"the subject this residuary estate was to go to
"other institutions.

"Q. You mean by other institutions other
177 "than than those on the face of the will and
"codicils?

"A. I mean exactly that."

Mr. Parsons: The same objection, protest and tender of stipulation repeated as to 378 x-Q.

Also, that there is not in evidence any record or any page 336 of any record, and that if such a record exists, it is the best evidence of what occurred.

Mr. Sherman: I suppose from the silence and pause that is the end of the objections, and I will modify that question by striking out the reference to page 336.

The Witness: Then the question is, Did I hear that testimony?

Mr. Sherman: Yes.

178

A. Yes, sir.

381 x-Q. Did you hear Mr. Parsons on that occasion or reference testify as follows:

"I will answer one branch of the inquiry further,
"I will make one further statement in answer to
"the inquiry, that is this, that from the beginning
"of my connection with the case down to now I
"advised my clients that it was right that all con-
"cerned should have the possession of all evidence,
"written or oral, which could bear upon the deter-
"mination of any of the questions which

" are in issue concerning Mr. Fayerweather's es-
" tate. The very so-called memoranda which were
" put in evidence before the Surrogate were put in
" evidence as the result of a conference between Mr.
" Ritch and myself following a conference with the
" executors in which I took the position that it was
" not for them to determine what should be done
" with this estate: it was not for them to decide
" whether this will should or should not be proved;
" that was for the Court to determine when
179 " all of the evidence that anybody desired
" bearing upon the subject should be before
" the Court. Much of that evidence could have
" been withheld, much of the evidence which has
" been before the Court in the Amherst College
" suit could have been withheld, but the position
" which the counsel for the executors took at
" the start, and to which they have adhered to
" the end, was, that their relation to this con-
" troversy was of a trust character; that it
" was for them to give the Court all the facts
" which they knew for the Court to decide; and I
" defy anybody to point to anything, from the be-
" ginning to the end of this litigation in the way of
" action on the part of counsel which is adverse to
" that view."

180

Mr. Parsons: Same objection as to the last question. I won't compel you to write it out.

A. I did.

382 x-Q. Did you hear Mr. Parsons asked these questions and did you hear him make these answers upon that reference:

"Q. The memorandum which you have described
" here, was it in relation to the codicil made on the
" dying day of Mr. Fayerweather? A. I have tes-

"tified to that; the memorandum about other in-
"stitutions to which I have referred was made on
"the day of the execution of the codicil by which
"these gentlemen take.

"Q. Was that the day on which Mr. Fayer-
"weather died? A. My recollection is that that
"is the testimony, I was not there; how do I know?"

A. I heard that testimony given.

385 x-Q. Did you hear Mr. Parsons asked this question and did you hear him make this answer upon that reference:

181

"Q. You have said here to-day that all data
"necessary to reach a just conclusion was then laid
"before these gentlemen; and I ask you to find
"any time, any evidence, any place, any proof,
"that that fact was laid before them. A. I presume
"that the paper to which reference is made is the
"memorandum as to which I gave full testimony
"yesterday, a memorandum that so far as Mr.
"Fayerweather had wishes the residuary estate was
"to go to other institutions. I attended with that
"memorandum myself, regarding it as of import-
"ance, in court on the probate trial, ready
182 "to produce it if it were called for by Mr.
"Coudert. There was some inquiry in ref-
"erence to the envelope according to my present
"recollection having some bearing on the subject;
"I have forgotten what it was. Mr. Coudert did
"not ask for the paper and I retained it in my
"possession."

Mr. Parsons: Same objection.

A. I heard Mr. Parsons so testify.

384 x-Q. Did you hear Mr. Parsons asked these questions and did you hear him make these answers?

"Q. Mr. Coudert did not at that time know "there was any such paper? A. I do not know.

"Q. Did you tell him so? A. I do not know "why I should tell him so.

"Q. Did you purposely conceal it from him? A. "I concealed nothing. I produced everything that "was asked for.

"Q. Did you produce that paper at that probate "court or produce it to Mr. Coudert or Mr. Rollins

"at any time before the agreement for this

183 "release was signed? A. I had all the mem-

"oranda on this probate contest, and as they "were called for produced them. That was not "called for and it was retained."

Mr. Parsons: Same objection.

A. I heard Mr. Parsons so testify.

385 x-Q. Did you hear Mr. Parsons on that occasion asked these questions and did you hear him make these answers:

"Q. Please to state how Mr. Coudert could know "that such a paper was in existence or Mr. Rollins? "A. He could have asked if there were other mem-"oranda. I take that back, I decline to answer.

184

"Q. Did you tell him there were any other "memoranda? A. I have already answered as "fully as I can.

"Q. Did you try to conceal that other memoran-"dum from him? A. I tried to conceal nothing.

"Q. Did you conceal it from him? A. I did not.

"Q. Did you show it to him? A. I did not vol-"unteer to show it to him.

"Q. Did you let him know it existed? A. I had "no conversation that I recall on the subject.

"Q. Did you, in writing Mr. Coudert, let him or "Mr. Rollins know of its existence? A. I have no "recollection of having had any correspondence "with him on the subject of that memorandum, or "any memorandum, except as I have already "stated."

Mr. Bovee: Same objection.

A. I heard Mr. Parsons so testify.

386 x-Q. Did you hear Mr. Parsons in that refer-
185 ence asked these questions and did you hear him make these answers?

"Did you let them know of the conversation that "Mr. Vaughan testified to as taking place between "him and Mr. Fayerweather on the morning of the "dying day, in substance that other institutions as "to the residue would have to be found, and the "money would have to be given to them? Will "you swear you ever let Mr. Coudert or Mr. Rol-"lins, let them know anything about that, and "that they ever knew anything about that until "two years after you got those releases? A. I do "not recall, but this I do know, I was employed to

"obtain the probate of these papers offered
186 "for probate as the will and codicils "of Mr. Fayerweather. Mr. Coudert "was the opposing lawyer; I recognized the "right of Mr. Coudert to any information in "the possession of these gentlemen for which "Mr. Coudert asked, but have yet to learn "that if Mr. Coudert thought that evidence "of which I knew would be favorable to his side of "the controversy, I being on the other side, my "duty to my clients required that I should en-"deavor to hurt their case? I understand that my "professional duty was just the reverse of that. "Remember, this was the question of the probate "contest."

Mr. Bovee: Same objection.

A. I heard Mr. Parsons so testify.

387 x-Q. Did you hear Mr. Parsons asked these questions and did you hear him make these answers upon that reference:

"Q. You were familiar at that time with the duty "of a trustee in obtaining a release from the bene- "ficiaries to disclose the fullest information, every- "thing that he knew that would aid that *cestui*
"*que trust* in reaching a determination of
187 "how much property belonged to it, and
"what his duties were in it, were you not?
"A. I think I shall decline to acquiesce in the "statement which is put to me in the form of a "question.

"Q. You were not familiar with that principle "at that time, were you? A. I think I shall de- "cline to dignify by the name of principle the pro- "position which the counsel has just embraced in "his inquiry."

Mr. Bovee: Same objection.

A. I heard him so testify.

388 x-Q. Did you hear Mr. Parsons asked and did you hear him answer as follows on that reference:

188

"Q. Did you or did you not know when those re- "leases were obtained that the executors had not, "and you as their counsel had not, disclosed all the "information that you had in your possession bear- "ing upon the amount of that property or the in- "terest of the widow or nieces in that property? "A. I did not.

"Q Was that memorandum on an envelope, the "memorandum you have referred to? A. I do not "understand the question.

"Q. Was the memorandum that you have re-
"ferred to in one sentence of which was 'Other
"'institutions for benefit'—— A. I do not under-
"stand the question. I testified time and again
"yesterday and to-day that there was such a mem-
"orandum, and have testified to all I know about
"it.

"The memorandum in question is one that con-
"tained among other sentences the one 'Other in-
"stitutions for benefit.' A. I have said so a great
"many times.

189

"Q. You have said so. Did you produce that at
"the probate trial? A. The probate had nothing
"to do with any such inquiry, but I did have that
"paper on the chance that it might be asked for,
"and was ready to prodnce it.

"Q. You had it there on a chance that it might
"be asked for, and you were ready to produce it.
"Did you give any information to the widow and
"nieces or to their counsel or either of them that
"there was such a paper in existence? A. I ~~think~~
"think it is extremely unlikely that I should do
"so.

190

"Q. Did you? A. I have no recollection further
"than I have testified."

Mr. Bovee: Same objection.

A. I heard that testimony by Mr. Parsons.

389 x-Q. Is any part of the information or evidence which you learned and which entered into your judgment in inducing you to bring the suits referred to by Mr. Parsons in your direct-examination contained in the record of testimony in the New York Surrogate's Court in the matter of the partial settlement of the ac-

count of Justus L. Bulkley, Thomas G. Ritch and Henry B. Vaughan, the executors of the estate of Daniel B. Fayerweather before Scott Lord as Referee?

Mr. Parsons: Same objection, protest and tender of stipulation repeated as to 378 x-Q.

A. Yes, sir.

390 x-Q. Were you present at that reference commencing June 27, 1892? A. Yes, sir.

191

391 x-Q. Did you hear William Henry Arnoux testify in that proceeding? A. Yes, sir.

392 x-Q. Is William Henry Arnoux one of the defendants joined in the action with Mr. Parsons to which Mr. Parsons referred in your examination in chief?

Mr. Bovee: One moment; we object to that as irrelevant and immaterial to the issue; the record is the best evidence whether he is or not a party.

A. He is named as a defendant but we have not been able to catch him here to serve him since we brought the suit.

Mr. Parsons: A little louder; we do not hear you.

192

The Witness: He is named as one of the defendants, but we have not been able to catch him him here since we began the suit. We shall improve the first opportunity,

Mr. Bovee: I move to strike out the answer as a conclusion.

393 x-Q. Did Mr. William Henry Arnoux give testimony on that occasion respecting the preparation which he made, as counsel for the executors or some of them, for obtaining the probate of the will and codicils which have been introduced in evidence by the defendants herein? A. Yes, sir.

Mr. Bovee: The same objection, Mr. Stenographer.

394 x-Q. Was that report the basis of a decree by the Surrogate making allowances to the defendants, or some of them, including the law firm of Arnoux, Ritch & Woodford?

Mr. Bovee, We object to that as irrelevant and immaterial.

A. I think it was in relation to a charge of $50,000 for his services, and that was one of the principal
193 items he gave as a reason why that charge should be sustained, or that amount should be charged.

395 x-Q. Did you hear him testify upon that proceeding in support of that allowance claimed from the Surrogate as follows:

"Now, the time of finding the Surrogate, and "having that conversation which I detailed here in "a few minutes, to reach an official with the "crowded calendar that he has, and a man of his "labors for the public, I think one of the most "efficient officials in the city, that took the greater "part of the day to get it, and then he said, 'All "right, we will set down this case for such a day
"and we will continue it for such a length of
194 "time'; and I then said: 'Now, the first
"thing I want to do is to explain about these "witnesses.' I called them one at a time into my "room and I examined them and went through the "matter with each one just as if it was in court?

"Q. You have gone into that? A. You wanted "it more in detail and I am going to tell you more "in detail. I acted as if I was both the direct and "cross-examining counsel, and I took them up and "went over it all. Then when I got through with "it I said to them: 'Now, I want each one to write "down your own examination in your own way "and as full as you can make it.' Mrs. Beardsley

"I did not see, nor did I see the two physicians,
"but so far as I now recall I saw every one else.
"Q. Whom did you see, Judge? A. I saw Mr.
"Fiske, Mr. Hitchcock, Mr. Woodford, Mr. Grout,
"Mr. Foster and Mr. Browning, and I had to
"go over Mr. Browning's testimony two or
"three times. Mr. Grout's testimony I was
"especially careful about, because he had wit-
"nessed the last codicil, which I could recognize
"would be the one that we would have the
195 "most serious litigation over because it was
"executed on the very day of Mr. Fayer-
"weather's death.
"Q. You have named six; is that all. You
"have named Mr. Fiske, Mr. Hitchcock, Mr.
"Woodford, Mr. Grout, Mr. Foster and Mr. Brown-
"ing. Who was Mr. Hitchcock? A. Mr. Hitch-
"cock had been a clerk in our office. He is Dr.
"Hitchcock's son, and he had gone out of the office
"and was practicing for himself, but he came to the
"office and submitted to this examination. Then I
"gave directions after that was done for some one
"else to make an additional examination, and when
"that was finished I brought, for instance, Mr.
"Grout and Mr. Browning together in my room,
"and I said, 'One of you testifies that this
196 "codicilwas executed at about—stating an
"hour—and theother one testifies that he
"does not remember exactly the hour. Now, 'I
"'said can you bring to one another's mind about
"'the time?' and Mr. Browning said, 'I recollect
"'distinctly; I can fix the time because there was
"'a clock at the head of the stairs or on the land-
"'ing of the stairs,' and as I went, either way, up
"'or downstairs, I do not remember which now, he
"'said, 'I turned around and locked at that clock
"'and it was just such a time, so many minutes
"'after two o'clock, if I recollect right.'

"Q. Was he then on the way downstairs after "the execution of the last codicil? A. I do not re- "member whether it was going to or from Mr. "Fayerweather's room, but it was at that time. "He told me which it was, and I am only showing "how careful I was about it; and Mr. Grout said, "'I did not look at the clock;' but I do remember "some circumstances which occurred which led him "to acquiesce in the exact time. Now, the result "of that examination was this, if I may say
197 "it: The Surrogate said that Mr. Grout had "been the finest witness he had ever seen in "his life in any litigation, either before him as "Surrogate or anywhere else, because he knew the "facts and was able to account for every minute.

"Q. And because he was so well coached? A. "And because he was so well coached; and you can "recognize as a lawyer that it occupied a great deal "of time. I was exceedingly careful in the course "of that litigation. There was no hesitancy on the "part of the witnesses in telling what had been done "by them in regard to the codicils. Those of them "that knew could tell the room they were in, the "persons that were present, the place where
198 "the papers were signed or anything about "it, or they could tell right away that they "did not recollect. There was no hesitancy on the "part of any one of the witnesses in regard to what "they had done.

"Q. Those were six gentlemen. Do you recall "any others? A. I think I am doing well in naming "six out of the number without looking at the "record, but if you will let me take the record I "can tell you who they were.

"Q. I have not got it with me to-day; I did not "know I would need it to-day and did not bring it "over. There was a man named Butcher, was there "not? A. Yes; Butcher was a witness, and I fol-

" lowed the same course with Butcher. Butcher is
" one of our managing clerks and he has charge of
" the common law branch of the office, and I did so
" with Butcher."

Mr. Bovee: Same objection, protest and tender of stipulation as to 378 x-Q.

A. I heard Mr. Arnoux testify before Mr. Scott Lord as you have read.

396 x-Q. Did you hear Mr. Arnoux on that occasion asked these questions and make these answers:

199

" Q. What did he hold on that? A. My recol-
" lection is that when it became a question of doubt
" that Mr. Parsons and I in a conference concluded
" it was not worth while to take the attitude of ap-
" pearing to want to suppress testimony on tech-
" nical points, and as there was nothing in them
" that we were afraid of we concluded that we would
" let the Surrogate receive them. Then there were
" other questions which I knew would come up;
" the first one was in regard to Mr. Woodford's evi-
" dence, whether he having acted as counsel for Mr.
" Fayerweather could be called upon to testify
200 " upon in regard to the matter, or was competent
" to testify in regard to the facts of the will or
" what had taken place, and I, knowing the deci-
" sions, would not rest on my own knowledge of
" them, but had them all collected for the purpose
" of being ready if the question was brought up to
" refer the Surrogate or the counsel, as was neces-
" sary, to the authorities that held that where the
" professional adviser of a decedent became a wit-
" ness that the testator thereby waived the right of
" professional obligation. Then there were other

"questions, There was the question about the "power of the Surrogate to commit Mr. Butler for "contempt of court if he refused to answer, and I "studied up the points on that question to see if "Mr. Butler had not the absolute right, notwith- "standing any opinion that the Surrogate might "entertain, of refusing to divulge what had taken "place."

Mr. Bovee: Same objection.

201

A. I heard Mr. Arnoux so testify.

397 x-Q. Did you hear Mr. Stewart L. Woodford testify on the reference before Scott Lord? A. I did.

398 x-Q. Did you hear Mr. Woodford asked these questions and make these answers:

"Q. Will you look at the paper which I now "hand to you, being a bill of Messrs. Evarts, Choate "& Beaman to the executors, dated September 17, "1891, for $5,000, and state whether you have "knowledge of services rendered by those gentle- "men in part to Mr. Fayerweather before his death, "and whether, in your opinion, the charge made "for the entire service is reasonable? A. I have

202

"knowledge of the service rendered, and I think "that the charge for the entire service is reason- "able.

"Said bill of Evarts, Choate & Beaman offered in "evidence, admitted and marked Exhibit No. 11, of "this date."

Mr. Parsons: Same objection, protest and tender of stipulation as to 378 x-Q.

Also, that it is manifest from the mode in which the examination is being conducted, all of the questions being of a leading character and only calling for an answer of acquiescence by the witness, that so far as the questions assume testimony to have been given by the persons who have been mentioned, there is not given the full testimony but only garbled and selected and incomplete and partial passages: that this would be apparent if the witness were compelled, instead of assenting to selected passages, the counsel were com-
203 pelled to put in evidence the record; and the counsel for the defense stand upon their right, as a matter of ordinary decency and fairness, to have the complete record instead of selected garbled passages.

A. In making answer to that, I should say that I heard that testimony given by General Woodford, and that I have carefully read recently the minutes of the stenographer in the Surrogate's office, and I suppose the questions are being read from those minutes taken from the Surrogate's office. I do not know that fact; I suppose that to be true.

Mr. Bovee: We move to strike out the answer of the witness. The minutes will speak for themselves.

204

Mr. Parsons: And we make a similar motion to all the preceding testimony, it being perfectly apparent by this answer that the witness has been testifying, not of knowledge but upon some supposition that he can rely upon statements made to him by his own counsel without any reference to whether the reliance is misplaced or not.

398 x-Q. Did you hear Mr. Woodford asked these questions, and did you hear him make these answers on that occasion?

"Q. Do you know when the services of Messrs. "Evarts, Choate & Beaman began in the proceed- "ings, what stage of them? A. About the time "when one of their number was called as a wit- "ness in the case.

"Q. Was that early or late in the proceeding, "Governor? A. I should say it was in the latter "half.

"Q. Did they take an active part in endeavoring "to uphold the will in that contest? A. I do
205 "not think they took any part in uphold- "ing or rejecting the will.

"Q. Your counsel has asked you here in regard "to a charge of theirs for $5,000. What was that "for? A. For such services as they rendered "prior to Mr. Fayerweather's death, and for the "services that they rendered in connection with "the testimony given by one of their firm on the "hearing before the Surrogate.

"Q. Please to detail as fully as you can what "services they rendered in connection with the "services of one of their firm in the hearing be- "fore the Surrogate? A. One of their number "was——

206

"Q. What is his name?

"Mr. Parsons: Butler.

"Q. Prescott Hall Butler? A. I do not recall "the gentlemen's names; the younger Mr. Butler "was put upon the stand and questioned with re- "gard to some codicil that was alleged to have "been made by Mr. Fayerweather before his "death. Mr. Butler in the course of that exami- "nation pleaded his professional privilege. The "Surrogate threatened him with imprisonment, an

"adjournment was taken so that Mr. Butler might "consult counsel with regard to his duty, and I "understood that he advised with Mr. Joseph H. "Choate, and when the case came on again, Mr. "Choate was in Court prepared, as he told me, or "that he had examined the matter and was pre- "pared to argue this question of privilege that had "been raised by Mr. Butler.

"Q. Did either Mr. Evarts, Mr. Choate or Mr.
"Beaman, Mr. Butler, Mr. Allan Butler—I
207 "believe they comprise the members of that
"firm—did either of them take any active "part in the proceeding looking to the probate "of this will other than you have described just "now? A. No, sir; not to my knowledge.

"Q. How much of their bill covers labor or serv- "ices rendered prior to the death of Daniel B. "Fayerweather? A. I do not know what distri- "bution they made.

"Q. Give me an impression of how they cut it? "A. My impression is that they were also con- "sulted between Mr. Fayerweather's death and "the contest in regard to the will, that just now "occurs to me, by Mr. Bulkley and Mr. Vaughan, "I think.

208

"Q. Then these services that you have detailed "of Messrs. Evarts, Choate & Beaman were the "ones which constituted the whole of their serv- "ices, so far as you know, in connection with the "probate of this will? A. With the matter that "I have just added, that I understood "that that firm was consulted by Messrs. "Buckley and Vaughan after Mr. Fay-

"erweather's death and prior to the contest prior "to the trial before the Surrogate.

"Q. Do you know on what question or ques- "tions? A. I could only answer from hearsay.

"Q. Well, state that, sir. A. I have heard that "the will and codicils were submitted to them by "Mr. Vaughan.

"Q. To Evarts, Choate & Beaman? A. To "Evarts, Choate & Beaman.

209

"Q. At what time? A. After Mr. Fayer- "weather's death and before the trial in the Sur- "rogate's Court.

"Q. With what end in view, or purpose? A. I "suppose with the purpose of retaining them or "employing them.

"Q. Your testimony has been, if I recall it right, "that the bill of Evarts, Choate & Beaman was to "cover services prior to the death of the testator "as well as those after? A. Yes, I understood "that that bill of $5,000 covered all the professional "services they at any time rendered either to Mr. "Fayerweather or to his estate.

210

"Q. They state they were consulted and advised "concerning and as to effecting the probate of the "will and settlement of the estate. I understand "you to say it covered items of service rendered by "them prior to the death of the deceased. A. I "do. I understood that that was their entire bill "against Mr. Fayerweather and against his estate "and against his executor."

A. I heard——

Mr. Bovee: Same objection, protest and tender of stipulation as to 398 x-Q. [Folio 273].

A. I heard Mr. Woodford so testify.

Mr. Parsons: I wish to place upon the minutes this: We shall examine the witness when the opportunity is afforded with reference to what occurred on the probate trial and with reference to what occurred upon the trial before Judge Traux, and we desire him to prepare himself for giving testimony upon those subjects,
211 that he shall do what he has testified to have been done by him with reference to the proceeding before Mr. Dayton and the proceeding before Mr. Scott Lord, read the record so that he can testify in the same glib way to us as he has done to his own counsel.

The Witness: I suppose you will read it to me, Mr. Parsons.

Adjourned to January 15th, 1901, at 2 P. M.

---

212 NEW YORK, January 15, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. CARNOCHAN, Mr. McLOUGHLIN, a representative of Messrs. Butler, Notman, Joline & Mynderse, a representative of Messrs. Nash & Jones, and a representative of Messrs. Root, Howard, Winthrop & Stimson, and a representative of Mr. Kiddle.

Adjourned to January 16, 1901, at 11 A. M.

JOHN B. REYNOLDS.

NEW YORK, January 16, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. CARNOCHAN, Mr. McLOUGHLIN, and representatives of Butler, Notman, Joline & Mynderse, Messrs. Nash & Jones, and Messrs. Root, Howard, Winthrop & Stimson.

213

Adjourned to January 18, 1901, at 10.30 A. M.

NEW YORK, January 18, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. BOVEE, Mr. FAIN, Mr. McLOUGHLIN, a representative of Messrs. Butler, Notman, Joline & Mynderse, and a representative of Messrs. Nash & Jones.

214

Adjourned to January 19, 1901, at 10.30 A. M.

NEW YORK, January 19, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. BOVEE, a representative of Messrs. Nash & Jones, Mr. McLOUGHLIN and Mr. FAIN.

Adjourned to January 22, 1901, at 2 P. M.

JOHN B. REYNOLDS.

NEW YORK, January 22, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. BLAIKIE, Mr. SHERMAN, Mr. BOVEE, Mr. MCLOUGHLIN, Mr. FAIN, and a representative of Messrs. Nash & Jones.

Mr. Sherman: Counsel for complainants moves to strike out from the testimony of the defend-
215 ants in chief the briefs which were introduced in the absence of counsel for complainants, and while the record was before the Circuit Judge upon a certificate, on the ground that the same were improperly introduced, were incompetent and irrelevant and immaterial, and on the ground that while the record in an equity cause under the 67th Equity Rule is pending before the Circuit Judge upon the certificate of the Examiner, the Examiner does not retain control or authority over the record and is not authorized to receive evidence until it shall be returned to him by the Circuit Judge.

Mr. Bovee: Counsel for the defendants object to the striking out of the testimony upon the ground that it was regularly introduced after due notice to counsel for the complainants after waiting thirty minutes
216 after arriving before the Examiner at the time appointed in the notice. The testimony was regularly introduced.

Mr. Sherman: Counsel for the complainants resume the cross-examination of John B. Reynolds.

Continuation of the CROSS-EXAMINATION of JOHN B. REYNOLDS by Mr. Sherman:

399 x-Q. No answer appears upon the record to have been made by you to cross-question No. 380. That question is repeated: "Did you hear Mr. Parsons asked these questions and did you hear him make these answers at page 336 of that record:

"Q. Were you not aware at the time of that deed "of gift that besides the will and codicils you refer "to, there were certain memoranda signed by Mr. "Fayerweather and in the possession of one of "these executors? A. I do not remember where "the memoranda were or in whose possession. I "know that one that I regarded of the greatest im-"portance was in my possession.

"Q. What one was that? A. That was a memoran-"dum made by Mr. Vaughan in substantially the
217 "last interview that he had with Mr. Fayer-"weather, in which Mr. Fayerweather, according "to my understanding; told him that so far as he, Mr. "Fayerweather, had any wishes on the subject, this "residuary estate was to go to other institutions.

"Q. You mean by other institutions other than "those on the face of the will and codicils? A. I "mean exactly that."

Mr. Bovee: Same objection, protest and tender of stipulation as to 380 x-Q.

A. I did hear Mr. Parsons so testify.

400x-Q. Mr. Reynolds, were you present during the trial of the five college action before Judge Truax? A. Yes, sir.

218

401 x-Q. Did you hear Henry B. Vaughan testify in that action? A. I did.

402 x-Q. Did you hear him asked these questions and make these answers:

"By Mr. James: Q. After the death of Mr. "Fayerweather, did you not at all times maintain "and insist that the devises and bequests of Mr. "Fayerweather to yourself and Ritch and Bulkley "of his residuary estate were absolute? A. Yes, "sir.

"Q. Did you not always since Mr. Fayerweather's "death deny that there was any trust of the resi- "due? A. Yes."

Mr. Bovee: Counsel for the defendants object to the question and to the line of the examination upon the following grounds:

First, that it is irrelevant to the issues presented by the special plea; that as to similar questions Judge Lacombe has stated it to be his opinion that they are
219 irrelevant; that under the circumstances to pursue the inquiry is disrespectful to the Court and wholly indefensible and unjustifiable.

Second. The manifest purpose of this and similar questions is, under the pretense of a claim of testimony relevant to the issue, to get upon the record matters having no relation to such issue, and defendant's counsel reiterate the stipulation which they have heretofore tendered to remove all irrelevant matter from the record, and they protest and object against being put to the necessity of introducing irrelevant testimony or of leaving unanswered statements which are untrue and which are absolutely denied; also upon the ground that the record of what was testified to by the witnesses
220 in the case of Amherst *vs.* Ritch is the best evidence of what testimony was given there. We object to the testimony as incompetent, irrelevant and immaterial.

The Witness: What is the question?

Question 402 repeated by stenographer.

The Witness: May I refer to that book?

Mr. Sherman: You may refresh your memory if you like, if you cannot answer without.

A. I heard that question asked and answered by Mr. Vaughan.

403 Q. Was it answered in the negative or in the affirmative?

Mr. Bovee: The same objection as before.

A. It was answered: "Yes."

404 x-Q. Both questions?

Mr. Bovee: Same objection.

A. Yes.

Mr. Bovee: Counsel for the defendants moves to strike out the answer of the witness upon the ground that it is a conclusion of the witness and not evidence of the fact, and as incompetent.

221

405 Q. Did you hear Justus L. Bulkley testify upon the trial of the five college action? A. I did.

406 x-Q. Did you hear him asked these questions by Col. James and did you hear him make these answers:

"Q. Did you ever inform Mrs. Lucy Fayer-
"weather or Mrs. Mary W. Achter or Miss Emma
"S. Fayerweather or any one representing them at
"any time since the death of Daniel B. Fayer-
"weather that you and Ritch and Vaughan held
"the residuary estate of Daniel B. Fayerweather
"upon any trust? A. No."

222

Mr. Bovee: Counsel for the defendants objects upon the ground that the matter is irrelevant and immaterial to the matter presented by the special plea and incompetent, and that the record in Amherst College *vs.* Ritch is the best evidence of what was testified to by the witnesses in that case.

A. I did hear the question so asked and answered.

407 x-Q. Did you then and there hear him testify in response to the question:

"Q. Throughout the proceedings in the Surro-
"gate's Court did you not deny that you held it
"upon any trust, you or your representative there
"in Court? A. It was so held by the executors, of
"course, that they did not hold it under a secret
"trust; the whole contest as I understood it was
"that we did not hold it under a secret trust.

"Q. That was your position? A. Yes.

"Q. Throughout the whole contest? A. Yes.

"By Mr. Root:

223

"Q. Did you ever before Mr. Fayerweather's
"death know that you had been made a residuary
"legatee? A. On the day of his death I was in-
"formed of it.

"Q. By whom? A. By Mr. Ritch.

"Q. Was that in connection with information
"that Mr. Fayerweather was dying? A. He made
"the expression 'You will probably never see Mr.
"'Fayerweather again.'"

Mr. Bovee: Counsel for the defendants object to the testimony, the questions and the answers, upon
224 the ground that it is irrelevant and immaterial to the issues presented by the special pleas; and the record of the case of Amherst College *vs.* Ritch is the best evidence of what was testified to by the witnesses there.

A. I heard those questions asked him and I heard the answers given as read.

408 x-Q. As read; do you mean as stated in this question? A. Yes, sir; as stated in that question.

409 x-Q. Did you hear Mr. Thomas G. Ritch testify in that trial? A. I did.

410 x-Q. Did you hear him asked these questions by Colonel James and did you hear him make these answers:

"Q. Did you ever represent to Mrs. Fayer-
"weather that you and your co executors held this
"residuary estate of D. B. Fayerweather upon a
"trust for the benefit of any college or other insti-
"tution or corporation? A. I do not remember
"that I did.

225

"Q. Did you ever so represent to Mrs. Achter or
"Miss Emma Fayerweather? A. I do not remem-
"ber.

"Q. Did you not insist and claim that you held
"that property absolutely, you and your co-execu-
"tors, to do with as you pleased? A. I did where-
"ever it was asked.

"Q. Did you ever, since the death of Daniel B.
"Fayerweather, represent directly or indirectly to
"his widow, Lucy Fayerweather, or to his nieces,
"Mrs. Achter or ~~Miss~~ Mrs. Emma S. Fayer-
"weather, that you and your co-executors
226 "tookthe residuary estate upon a trust for
"the benefit of any benevolent, charitable,
"literary, scientific, educational or religious or
"other corporations, societies or associations? A.
"I never did."

M. Bovee: Same objection to question and line of examination as to 407 x-Q.

A. I heard those questions asked and answered.

411 x-Q. Well, how did you hear them answered?

Mr. Bovee: Same objection.

A. As stated in the question.

JOHN B. REYNOLDS.

Mr. Sherman: Mr. Bovee, are you ready to take up Mr. Reynolds' redirect-examination.

Adjourned to January 23, 1901, at 10.30 A.M.

NEW YORK, January 23, 1901.

Continuation of the EXAMINATION of JOHN B. REYNOLDS:

227

413 Q. Were you here in this proceeding while witnesses were being examined or while evidence was being introduced yesterday?

Mr. Sherman: I instruct the witness that the attempt of the counsel for the defendants to interject this question into his cross-examination, and while a certificate is pending, is entirely irregular and illegal, and I advise him not to answer.

The Witness: Under advice of counsel I decline to answer.

414 Q. Were you here yesterday when your counsel read what purported to be depositions in the
228 Hamilton College plea case of the following-named witnesses: Elizabeth L. Goodwin, Dr. John A. Irwin, Elizabeth R. Joyce, the Rev. Dr. William Lloyd, Anner A. Reynolds and Maus R. Vedder?

Mr. Sherman: I give the witness the same advice.

The Witness: I make the same answer.

415 Q. Are we to understand that, the Examiner having ordered that your examination by us proceed, and thereupon your counsel having asked that the matter be certified to the Court, you propose at this time to refuse to answer any question?

Mr. Sherman: I give the witness the same advice upon the same grounds.

The Witness: And I make the same answer.

416 Q. In other words, you and your counsel combine to prevent our proceeding with your examination, although the Examiner has decided that it shall proceed.

Mr. Sherman: I give the witness the same advice upon the same grounds.

The Witness: I make the same reply.

Adjourned to January 28, 1901.

229

NEW YORK, January 28, 1901.

Met pursuant to adjournment.

Present—The EXAMINER. Mr. SHERMAN, Mr. BLAIKIE, Mr. PARSONS, Mr. BOVEE, Mr. FAIN, Mr. MCLAUGHLIN, a representative of Messrs. Russell & Holmes, and a representative of Messrs. Root, Howard, Winthrop & Stimson, and a representative of Messrs. Nash & Jones.

230

Mr. Parsons; I understand you desire to continue my examination.

Mr. Sherman: Either that or to submit Mr. Reynolds now to cross-examination, whichever you prefer.

Mr. Parsons: I will go on.

Mr. Sherman: Counsel for the complainants produces the witness JOHN B. REYNOLDS for redirect-examination by Mr. Parsons.

Mr. Parsons: The counsel for the defense, to prevent any possible delay or loss of time, will proceed with the cross examination of the witness Reynolds. They do so under protest against being compelled to cross-ex-

amine upon matters which are irrelevant to the issue, and in cross-examining the witness they do not waive their objection that such matter is irrelevant. Their cross-examination is in the nature of a *de bene esse* cross-examination conditioned upon the Court holding that the direct-examination of the witness is irrelevant. Furthermore, before proceeding with the cross-examination of the witness, they repeat the tender of a stipulation to strip the case of irrelevant matter, meaning by that matter which is irrelevant to the only
231 issue which they understand to be before the Court, that of estoppel by the judgment in the Five Colleges suit which they have pleaded in bar. Before proceeding with the cross-examination they furthermore put upon the record a motion to strike out all the testimony of the witness to which they have heretofore objected to as irrelevant.

Mr. Sherman: Counsel for the complainants inquires whether it is the meaning of counsel for the defendants in the so-called stipulation tendered upon the record that they should include any part of the examination-in-chief of the witness John B. Reynolds, and if so what part.

Mr. Parsons: Their examination related to the citizenship of the complainants, any arrangement
232 between them and the witness Reynolds for the bringing of the suit, and written communication from Mr. Coudert to Mrs. Fayerweather. They are indifferent whether those matters remain or not; they may be included in the stipulation or not as counsel for the complainants desire.

Mr. Sherman: Counsel for the complainants inquires whether counsel for the defendants mean thereby to admit that there is not in issue herein any question of the citizenship of the complainants or of laches on their part or of their contention that the releases herein complained of were obtained by fraud or the suppression of

material facts, and their contention that they had no knowledge of the material and essential elements to recovery herein at the time of the execution of the releases and until a ~~short~~ short time prior to the commencement of this suit.

Mr. Parsons: They meant exactly what they have heretofore said, and have nothing to add.

Mr. Sherman: Counsel for complainants declines to rely on the vague and in conclusive statements made by counsel for the defendants as to what they con-
233 tend is in issne herein, and declines to change the record by assenting to the proposition of the counsel for the defendants or the so-called stipulation.

Continuation of the EXAMINATION of JOHN B. REYNOLDS:

REDIRECT-EXAMINATION by Mr. Parsons:

417 RD-Q. When did you first become acquainted with Mrs. Daniel B. Fayerweather? A. With Mrs. Daniel B. Fayerweather?

418 RD Q. Yes, sir. A. Did you say Mrs.

419 RD-Q. Mrs. A. I think in the summer of 1888 in Saratoga; I cannot be quite sure of the year, but I think that was it.

234

420 RD-Q. Was it before or after your acquaintance began with the lady who is now Mrs. Reynolds? A. It was only an interview, a casual introduction by a mutual friend of ours, Mrs. Reynolds' and my own and Mrs. Fayerweather's and my own. We sat at adjoining tables in the United States Hotel for about a month I think, perhaps not as long as that, and that was the only time that I ever met Mrs. Fayerweather, Mr. Fayerweather or Mrs. Reynolds until after the death of Mr. Fayerweather.

421 RD-Q. How shortly after Mr. Fayerweather's death did you see Mrs. Fayerweather? A. Well, I should say nearly six months afterwards.

422 RD-Q. Where did you then see her? A. I was invited to their house by their next neighbor and themselves jointly, Mrs. Kilmer, Mrs. Chauncey Kilmer, friends of mine for more than twenty-five years.

423 RD-Q. Did the invitation come from Mrs. Fayerweather or from Miss Joyce? A. Mrs. Kilmer; I was in the habit of spending about one evening a week at
235 Mrs. Kilmer's with Mr. and Mrs. Kilmer, and I think they had arranged to have a card party in their house, the house of Mrs Fayerweather, and in order to make up a set, as they advised me, I was invited to fill up a vacancy. I had a very pleasant evening.

424 RD-Q. Your answer does not show how that brought you into relation with Mrs. Fayerweather or Miss Joyce, either or both. Were they at the Kilmer house? A. This evening, this entertainment or this party, card party, was in Mrs. Fayerweather's house, and Mrs. Kilmer arranged the matter; and there was a vacancy of one; I was spending the winter at the Murray Hill Hotel, and Mrs. Kilmer wrote me, or else the late Mrs. Kilmer's daughter, Mrs. Lake, I forget
236 which, to ask me if I would come, and as I was in the habit of going to their house frequently I went.

425 RD-Q. And was the outcome that you spent the evening at the Fayerweather house? A. Yes, sir.

426 RD-Q. Fix the date as near as you can? A. Well, I should think it was in March or April, 1891. I would not be sure about those months—let me see, about 1891—1892 I think it was.

427 RD-Q. Are you quite clear about the year? A. No, I am not, without refreshing my memory.

428 RD-Q. Possibly I can refresh your memory? A. It would be strange if you could not.

429 RD-Q. Have you not upon your direct-examination testified to a knowledge of what occurred before the Surrogate on the probate contest over Mr. Fayerweather's will?

The Witness: Personal knowledge of it? Read the question.

Q. Question No. 429 repeated by stenograper.

A. I do not remember any such testimony.

430 RD-Q. Do you mean, then, to be understood that you were not at any time in the Surrogate's
237 Court while that contest was going on? A. The only knowledge I had of it I received from the newspapers, and possibly at Mr. Kilmer's one evening, I think I heard the subject mentioned there, but it was after the contest.

431 RD-Q. Is it in your mind now that that contest was in 1891 and in the early part of that year? A. No, I think it was in 1892.

432 RD-Q. The contest? A. Oh, the contest—I think the contest was in 1891; I thought you spoke of my marriage or my acquaintance with Miss Joyce.

433 RD-Q. Do the questions which have just been put to you enable you to state, or do your answers to them enable you to state with more definiteness
238 in what year was this card party at the Fayerweather house, whether 1891 or 1892? A. Well, my impression is it was in 1891 on reflection, but I would not want to testify without refreshing my memory further or having you do so.

434 RD Q. Did you from that time on become a visitor at the Fayerweather house? A. Well, I do not think immediately.

435 RD-Q. How shortly after this card party visit did you become a visitor at the house? A. Well, it could not have been many months; I was invited there to din-

ner once by Mrs. Fayerweather, not very long after that the circumstances came up—I accepted, but circumstances came up and I did not attend.

436 RD-Q. What was the date of Mrs. Fayerweather's death? A. I think that was July 16, 1892, and and that is why my memory is refreshed that it must have been 1891 when I called at Mrs. Fayerweather's.

437 RD-Q. Can you be more precise than you have been about the month in which this first visit of
239 yours, the card party visit, occurred? A. No; I still think it was April or May.

438 RD-Q. Did you not previously say March or April? A. Well, March, April or May, I could not be more definite than that.

439 RD-Q. Did you see Mrs. Fayerweather frequently from that time on? A. Yes, sir; quite frequently.

440 RD-Q. At card parties? A. No, I do not think I was ever there on any other occasion when they had the playing of cards there.

441 RD-Q. At entertainments of various kinds? A. No, sir; I simply called there as a gentleman would if he was interested in the family or in any special member of it. I was a widower then and did as I
240 presume you do many times when you have an evening that you feel rather lonely.

442 RD-Q. Mr. Reynolds, will you oblige me by confining your answers to your own matters and not speak about what I do or do not do. All I wish to ascertain is—— A. I want to make it agreeable to you, Mr. Parsons, if I can, and plain.

443 RD-Q. All I wish is that you shall answer as directly as you can the questions which I put to you. What was the date of your marriage? A. It was early in the month of July, 1891.

444 RD-Q. Did you see Mrs. Fayerweather during the year 1891 at places other than the Fayerweather house? A. Yes, sir.

445 RD-Q. Where? A. We all went to Saratoga pretty soon after my marriage, to the Grand Union Hotel; we were there I should think for a month or more, and the remainder of the summer we spent at Rutland, Vermont.

446 RD-Q. When first did you become an inmate of the Fayerweather house? A. On our return from Rutland, I think, we went, all of us, to Mrs. Fayerwheather's house, and were there for a short period of
241 months, and then we went to California and spent the winter there.

447 RD-Q. And after that? A. And after that we came back to New York and I think the house was open all winter, we came back to New York for a month or six weeks, and spent the summer in Rutland, Vermont, at my house.

448 RD-Q. During the month or six weeks that you were in New York were you at the Fayerweather house? A. Yes, sir.

449 RD-Q. Did you ever have an interview with Mr. Frederic R. Coudert? A. Did I ever have an interview?

At the request of the witness Question 449 was repeated by stenographer.

242

The Witness: I think I did, once or twice.

450 RD-Q. When first? A. Well, I think it was before we went to California, but I cannot give definitely the date.

451 RD-Q. Does that mean late in the year 1891? A. I should think it did.

452 RD-Q. When first was your attention brought to the contest over the probate of Mr. Fayerweather's will? A. Well, it was during that summer following my marriage, I think, while we were at Saratoga.

453 RD-Q. Do you mean that you were never spoken to upon that subject before your marriage? A. I do not think I was—oh, it might have been casually mentioned.

454 RD-Q. Did you ever see the record of the probate trial? A. Did I ever see it?

455 RD-Q. Yes. A. Of course, I have now, but at what time do you inquire?

456 RD-Q. I am going to ask, and my next question is, when did you first see that record? A.
243 Well, just before going to California, if I remember right, I went to Mr. Coudert's office and asked for a copy of that record.

457 RD-Q. Did you get it? A. I got a part of it, that which related to the will before the codicils were considered.

458 RD-Q. Fix as nearly as you can that date? A. Well, it might have been December, January or February, I do not think later than February.

459 RD-Q. Do you mean that it could not have been earlier than December, 1891? A. I do not think so, I think it was just immediately before leaving for California.

460 RD-Q. Do you remember that by Mr. Fayerweather's will there was left to the lady who is
244 now Mrs. Reynolds, Miss Anner Amelia Joyce, an annuity of $1,000 so long as she should remain unmarried? A. I remember it so reads in the will, in the original will.

461 RD-Q. Do you remember that by the codicil of March 19, 1889, that was increased to $4,000, but subject to the same condition about remaining unmarried? A. I remember your stating that it was increased by the deed of gift, while I have been under examination.

462 RD-Q. Do you consider that a responsive answer to my question? A. Why, you read from that book and I heard from your mouth that it was given by the deed of gift. Now which shall I believe?

463 RD Q. Do you swear that my mouth has just said anything about the deed of gift? A. No, but it did on my former examination. I want you to be accurate when you read and when you speak.

464 RD-Q. I admonish you that you had better be careful to be accurate in what you say. A. I will take the admonishment and act upon it with what I deem discretion.

465 RD-Q. You will now be so good as to answer the question which I put to you, which is whether you
245 know that by Mr. Fayerweather's codicil of March 19, 1889, the annuity to Miss Joyce was increased to $4,000 subject to the same condition about remaining unmarried? A. I should rather take that version of it than the one which you gave on my other direct-examination.

466 RD-Q. Will you be so good as to answer my question? A. Yes, sir.

467 RD-Q. Answer it then, please? A. I accept that reading of it in preference to the other.

468 RD-Q. What reading? A. The one you have read there, that is more in accordance with my memory of the case.

469 RD-Q That is to say, that the codicil of March 19, 1889, increased the annuity to $4,000, and
246 made it subject to the condition about remaining unmarried? A. Yes, instead of the deed of gift which you said gave it to her.

470 RD-Q. Will you testify, under oath, that I have said anything about the deed of gift giving her $4,000? A. I will, here and in the other trial.

471 RD-Q. Do you not remember that what the deed of gift provides is that the annuity of $4,000 provided by the will is made for the period of Miss Joyce's life instead of for the period mentioned in the will. A. I so understand the deed of gift.

472 RD-Q. Don't you see, then, that you are a little out in your recollection about what has been said about

the deed of gift? A. Not the slightest; I said that you claimed that that deed of gift gave her $4,000 instead of the codicil, and you said it in this examination of me.

473 RD-Q. What has been said upon this examination will appear upon the stenographer's minutes. What I wish to supply by your testimony is beyond doubt that the provision in the deed of gift is that the $4,000 is made for the period of Miss Joyce's life instead of for the period mentioned in the will,

247 that is to say, while she remained unmarried? A. And you concealed the memorandum which Mr. Vaughan had to remove that in that codicil; that is the situation, Mr. Parsons.

474 RD-Q. Do you consider that answer as responsive? I think you understand what it means.

475 RD-Q. Do you consider your answer as responsive? A. I think it is making a clear statement for the record, and when I get through I mean to have every point clear.

476 RD-Q. Do you consider your answer as responsive? A. I will add anything you wish me to it now.

477 RD-Q. I wish you to answer it? A. Why, yes; I consider it responsive or else I should continue.

248

478 RD-Q. Are we to understand from your last answer that you are here as an advocate or as a witness? A. I am here as a witness to protect the interests of my wife and myself, and I will try and do the duty perfectly and with due regard and respect to Mr. Parsons, but it is going to be the truth that is going to be told, let it hit where it will.

479 RD-Q. Do you remember that succeeding the deed of gift Mrs. Fayerweather received $225,000?

At the request of the witness Question 479 was repeated by stenograper.

A. My understanding of the matter is considerably before my entrance into the family, Mr. Parsons.

480 RD-Q. Did you ever learn that fact? A. Yes, I suppose I knew the fact from general knowledge.

481 RD-Q. Did you also at one time learn that Mr. Fayerweather's will gave to his wife the house and lot No. 11 East Fifty-seventh street and the stable No. 145 East Fifty-seventh street? A. Yes, sir.

482 RD-Q. Who owns No. 11 East Fifty-seventh street now?

249

Mr. Sherman: Objected to on the ground that this witness was called by the defendants; that the present inquiry does not relate to any matter touched upon or alluded to upon the cross-examination, and is, therefore, not redirect-examination; that under the pretense of redirect-examination under a protest that the cross-examination was irrelevant the counsel for the defendants are now going into new matter in chief which is entirely outside any issue raised by any pleas, and not even competent evidence at large upon any topic presented by the bill or cross-bill; and counsel for complainants gives the counsel for the defendants notice that he will at all times and places insist that
250 by the inquiry into such topics under such circumstances the defendants have waived their pleas and overruled their pleas and introduced evidence at large in the cause.

Mr. Parsons: Answer, please.

At the request of the witness Question 482 repeated by stenographer.

A. Mrs. Reynolds.

483 RD-Q. Who now owns the stable No. 145 East Fifty-seventh street?

Mr. Sherman: Complainants' counsel's objections repeated in full.

A. I do not know.

484 RD-Q. Has it been sold?

Mr. Sherman: Same objections.

A. Yes, sir.

485 RD-Q. By whom was it sold?

Mr. Sherman: Same objections.

251

A. It was sold by Mrs. Reynolds.

486 RD-Q. Who received the proceeds?

Mr. Sherman: Same objections.

A. I suppose she did.

487 RD-Q. Don't you know?

Mr. Sherman: Same objections.

A. She gave her receipt for it.

488 RD-Q. Don't you know?

Mr. Sherman: Same objections.

A. I said she gave her receipt for the money.

252

489 RD-Q. I did not ask you whether she gave a receipt for the money, I asked you who received the proceeds.

Mr. Sherman Same objections.

A. Well, if you cannot understand that, she did.

490 RD-Q. What amount?

Mr. Sherman: Same objection.

A. $31,500, I think.

491 RD-Q. What became of the $225,000?

Mr. Sherman : Same objections.

A. That would be a very difficult question for me to answer.

492 RD-Q. Answer about so much of it as you know.

Mr. Sherman : Same objection.

A. I think Mrs. Fayerweather disposed of it by will in part, perhaps all, I do not remember.

493 RD-Q. To whom ?

253

Mr. Sherman : Same objections and on the further ground that it is incompetent, because the will is the best evidence of what disposition was made by Mrs. Fayerweather.

A. She remembered I think in different amounts all of her brothers and sisters and some of her nephews and nieces.

494 RD-Q. Anybody else ? A. Not that I remember of, no colleges in it.

495 RD-Q. Was Mrs. Reynolds one of the sisters ? A. Yes, sir.

496 RD-Q. How much came to her ?

254

Mr. Sherman : objections.

A. Well, as near as Mrs. Fayerweather could remember, what Mr. Fayerweather's wishes were in regard to her.

497 RD-Q. Did you understand me to ask you how much came to Mrs. Reynolds ?

Mr. Sherman : Same objections, and I make the further objection——

A. Yes, and I do not think I could answer it.

498 RD-Q. Answer as well as you can.

Mr. Sherman: Same objection, and I make the further objection that the only matter which is pertinent here is what disposition was made of an estate of six millions of dollars of which Daniel B. Fayerweather was robbed in his lifetime or at his death, and the property now inquired about having been conceded to be
255 the property of the persons whose disposition of it is now subject to inquiry by counsel for the defendants.

At the request of Mr. Parsons, Question No. 498 repeated by stenographer.

Mr. Sherman: Same objection.

The Witness: Well, as near as I can remember, about the same amount you have got out of the estate at the present date, Mr. Parsons, something exceeding $100,000.

499 RD-Q. How much exceeding $100,000? A. Well, I could not say exactly that, because it has not all been reduced to dollars.

500 RD-Q. Was it as much as $200,000?

256

Mr. Sherman: Same objection.

The witness: I should have to have those question tions read again.

Mr. Parsons: I am talking about what was received by Mrs. Reynolds.

The Witness: By Mrs. Fayerweather's will, is that it?

Mr. Parsons: Yes, by Mrs. Reynolds.

Mr. Shermon: Same objections.

The Witness: Well, my recollection is that she got about $10,000 by Mrs. Fayerweather's will, and that is all she got.

501 RD-Q. How much did she receive from Mrs. Fayerweather before she died?

Mr. Sherman: Same objections.

A. Well, she gave her $100,000 and a deed of the stable and the house.

259

502 RD-Q. What is the value of that house?

Mr. Sherman: Same objections.

A. I do not think I am competent to answer.

503 RD-Q. Have you any judgment about its value? A. Not any accurate judgment; I should inquire if I wanted to buy or if I wanted to sell, of somebody who knew better than I.

504 RD-Q. State such judgment as you have? A. When the question was before the State court, I believe, it was agreed that the stable and the house were of the value of $100,000.

260

505 RD-Q. I am asking you, and I desire an answer to my inquiry, about your judgment about the present value of that house?

Mr. Sherman: Same objections.

A. Well, I should think $75,000 or $80,000 would be a safe estimate on it.

506 RD-Q. Did the lady spoken of as Mrs. Emma S. Fayerweather receive anything from Mrs. Fayerweather? A. No, sir, she was a neice of Mr. Fayerweather.

507 RD Q. Are we to understand, then, that of this Fayerweather property or money, nothing went to Mr. Fayerweather's niece, Mrs. Emma S. Fayerweather?

Mr. Sherman: Same objections.

The Witness: Of Mrs. Fayerweather's money?

At the request of the witness, question 507 was repeated by stenographer.

A. None of Mrs. Fayerweather's money which
261 she received from the estate of her husband went to any of Mr. Fayerweather's relatives.

508 RD-Q. Do you include in Mr. Fayerweather's relatives, Mrs. Achter?

At the request of the witness, Question 508 repeated by the stenographer.

A. Yes, sir.

509 RD-Q. Do you know Judge Morris B. Beardsley? A. Yes, sir.

510 RD-Q. When first did you see him? A. I cannot recall the date.

511 RD-Q. Be as accurate as you can upon the subject? A. It was the—I do not remember having
262 met him before he was invited to our wedding; it is possible that I did meet him before, but I do not recollect it.

512 RD-Q. Have you seen him from time to time since then? A. Yes, sir.

513 RD-Q. Frequently? A. Yes, sir.

514 RD-Q. Where? A. Well, at my house or our house or the house.

515 RD-Q. You have described that house by three terms now, as "my" house or "our" house or "the" house; which do you mean? A. You have tried to make it my home; I want to fix it so that you can locate me in any room there, and so long as you want.

516 RD-Q. Practically that Fayerweather house has become a Reynolds house, has it not? A. No, sir, except as being the wife of Reynolds.

517 RD-Q. Did you have anything to do with the Fayerweather settlement? A. Not the slightest; if I had it would have been done very differently.

518 RD Q. In addition to the amounts which you have stated, does not Mrs. Fayerweather's will give to Mrs. Reynolds any residuary estate which might belong to her?

263

Mr. Sherman: Same objections.

A. Yes, sir; I did not think of that when I was answering my question that she gave her $10,000. And the residuary estate, which, up to date, has been a very expensive bequest, through the ingenuity of Mr. Parsons and others.

519 RD-Q. Is Miss Emma S. Fayerweather staying at your house at the present time? A. At 11 East 57th street.

520 RD-Q. How long has she been there? A. Well, since I found her address that you were inquiring so particularly about, I think about four weeks ago.

264

521 RD-Q. Did I ask you anything about your finding her address which I was asking about?

Mr. Sherman: Objected to as immaterial.

A. Well, I was trying to fix that date as well as I could; you might remember the circumstances; and she has been there ever since that time; I do not remember when it was.

522 RD-Q. Is it any gratification to you to make irresponsive answers?

Mr. Sherman : Objected to as immaterial, impertinent and irrelevant.

At the request of the witness, Question 522 repeated by stenographer.

A. It is very highly so, when the question will permit me to do so and won't permit me to make a satisfactory answer otherwise.

523 RD-Q. Are you the executor under Mrs. Fayerweather's will ? A. Yes, sir.

265

524 RD-Q. Do you know anything about a proposal by Mrs. Fayerweather that if the settlement went through in accordance with her wishes she desired that the nieces, Mrs. Emma S. Fayerweather or Miss Emma S. Fayerweather and Mrs. Achter, should settle also, and that if they did so, she herself out of what came to her would provide for them ?

At the request of the witness, Question 524 was repeated by stenographer.

Mr. Sherman: Objected to on the ground that the question does not refer to any matter of which this witness can have had direct knowledge, and
266 therefore necessarily hearsay; because the assumption embodied in the question is not sufficiently specific to show that it can be relevant, pertinent or material to any matter at issue, or which is capable of being put at issue in this cause; as an obvious fishing excursion and not within the right of re-direct-examination of the defendant's witness ; on the further ground that the proposition, if made in writing, cannot be established in this manner, and if not made in writing is obviously within the prohibition of Section 829 of the Code of Civil Procedure ; and on the further ground that if such proposition was made it is upon its face obviously by way of

compromise and, therefore, not competent to be given in evidence in the cause.

At the request of of the witness, Question 524 repeated by stenographer.

The witness: I wish you would read that again (Question No. 524 again repeated).

A. I can only give my impressions from what I learned long after it from Mrs. Fayerweather.

267

Mr. Sherman: That is objected to as hearsay and on the other grounds just stated.

525. RD-Q Have you as executor——

The Witness: I have not got through, Mr. Parsons. From her I learned that some suggestion came from Mr. Parsons to that effect, and she rejected it with great ndignation, saying that she would have no negotiations with the neices, or have any influence over them whatever.

526 RD-Q. Have you now stated all your in-
268 formation upon the subject? A. In substance; I could give a good many more remarks to that effect.

527 RD-Q. Have you forgotten what, within the last two or three months, has been said to you upon the subject by Morris B. Beardsley?

Mr. Sherman: Objected to as entirely immaterial what Judge Morris B. Beardsley has said to this witness out of court within three or four months.

A. I think I can remember every word that Morris B. Beardsley said, and if you wish me to repeat them, I can say what I remember he said.

528 RD-Q. Did he say anything upon that subject?

Mr. Sherman: This is objected to as entirely incompetent, it being entirely immaterial what Judge Morris B. Beardsley has said to this witness out of court within three or four months?

A. No, sir, he has not.

529 RD-Q. Did Mrs. Fayerweather to your knowledge or according to any information which ever came to you, do anything for Mrs. Emma S. Fayerweather or Miss Emma S. Fayerweather and Mrs. Achter?

269

Mr. Blaikie: Same objections.

A. No, sir.

530 RD-Q. Have you as her executor ever done anything?

Mr. Blaikie: Same objections.

A. No, sir; there were no provisions for them in her will.

531 RD-Q. Without reference to whether there is or is not such a provision in her will, have you ever done anything for them?

Mr. Blaikie: Same objections.

270

A. If you mean if I have ever paid them any money from Mrs. Fayerweather's estate, no.

532 RD-Q. Or on Mrs. Fayerweather's account?

Mr. Blaikie: Same objections.

A. No, sir.

533 RD-Q. By your last answer which mentions the name of Mr. Parsons, do you wish it to be understood that you were ever informed that Mr. Parsons ever saw Mrs. Fayerweather?

Mr. Blaikie: Same objections.

A. I do not know that I have any definite understanding on that point, I know you were frequently referred to by them, by her, during her lifetime, and the information that I have got from it was impressions which I received from her that you were the principal in making the negotiations on the part of the executor or executors and that the communication which I referred to as coming from you probably came through Mrs. Fayerweather's attorney, Mr. Coudert, or his office.

534 RD-Q, Did Mrs Fayerweather ever say any-
271 thing to you which in any way implied that Mr. Parsons ever had a conference with her or ever saw her?

Mr. Blaikie: Same objections.

A. No; the impressions that I got were that you had not.

535 RD-Q. Did you get from Mrs. Fayerweather any impression that Mr. Parsons ever wrote to her or that she ever received from him a written communication of any kind?

Mr. Blaikie: Same objections.

A. No, except through Mr. Coudert.

272

536 RD-Q. Did you ever get from Mrs. Fayerweather any impression that Mr. Coudert ever saw her personally?

Mr. Blaikie: Same objections.

A. I did get such an impression; yes, sir.

537 RD-Q. That there was ever a personal interview or conference between her and Mr. Coudert?

Mr. Blaikie: Same objections.

A. That is my understanding, that there was.

538 RD-Q. Were you present on this examination when the objection was made that what passed between Mr. Coudert and Mrs. Fayerweather was privileged?

Mr. Blaikie: Same objections.

A. Yes, sir.

539 RD-Q. And was that objection taken on your behalf?

Mr. Blaikie: Same objections.

A. I suppose it was, so far as I had information.

273

540 RD-Q. Or, in other words, you were not willing to permit Mr. Coudert to state what passed between him and Mrs. Fayerweather, whether orally, if anything orally passed; or, in writing, if anything passed in writing?

Mr. Blaikie: Same objections.

A. I could not say that I was unwilling, but under direction of counsel I declined to answer.

541 RD-Q. Are you unwilling?

Mr. Blaikie: Same objections.

274

A. Under advice of counsel, I am.

542 RD-Q. Have you ever read the entire probate record?

Mr. Blaikie: Same objections and as incompetent, irrelevant and immaterial also.

A. I am sorry to say that I am more familiar with it, and have been for the last eight years, than I have been with my Bible.

543 RD-Q. Manifestly I cannot know how familiar you are with your Bible. What I want to know is whether you have ever read the entire probate record?

Mr. Blaikie: Same objections.

A. You can catechise me on the Bible and on the probate record, too. I have read it, and I think I could detect you in any misquotation of it from one cover to the other, and I have often done so.

544 RD-Q. The point concerned here is, Mr. Reynolds, to what extent you have incorrectly stated what occurred before the Surrogate, or suppressed matters which the record shows to have occurred, and I wish to call your attention particularly to some parts of your testimony bearing upon that? A. Yes, sir.

275

545 RD-Q. I understand from your last answer, am I correct, that eight years ago you were familiar with the entire probate record. Am I right?

Mr. Blaikie: Same objections.

A. No; I say that now I am as familiar with it and have studied it more than I have my Bible during the last eight years.

546 RD-Q. What I am trying to get at is when, first, you were familiar with the entire probate record. Will you be so good as to answer that question?

276

Mr. Blaikie: Same objections.

A. Yes, sir; if you put it that way. After our return from California, having investigated and read pretty thoroughly the probate record up to the point of the allowance of the will to probate I saw that my record was not complete, and I immediately went to Mr. Coudert's office and obtained the second part, beginning, I think, at page 628 of the probate record, and when I had thoroughly examined that I thought I saw clearly——

547 RD-Q. I have not asked you what you thought and I do not care, and I object to your volunteering a statement. The question simply inquires when first you were familiar with the entire probate record? A. I want to show how familiar I was with it.

548 R-D-Q. I have not asked you how familiar you were, and if you persist in volunteering intentionally irresponsive testimony, the only course left open to us will be to bring it to the attention of Judge La-
275 combe. Now, will you be kind enough to make a direct answer to the question which was put to you?

Mr. Blaikie: Same objections.

A. What is your question?

549 R-D-Q. The object of the question is to ascertain at how early a period you were familiar with the entire probate record, not only the first part, but that of which you speak as the second part?

Mr. Blaikie: Same objections.

A. Well, it was during the first half, perhaps, of the year 1892.

550 R-D-Q. Do you remember the testimony which, upon your direct examination by your counsel,
276 you gave about the commencement of a suit by Mrs. Fayerweather's heirs?

Mr. Blaikie: Same objections.

A. If you read the testimony I will answer that definitely.

551 R-D-Q. Have you no recollection independent of reading the testimony about what you said upon the subject of any such suit?

Mr. Blaikie: Same objections.

A. Well, I am telling the truth and I do not have to remember what I said. If you have got it there and can read it I can say whether I said it or not.

552 R-D-Q. Were you asked this question and to it did you give this answe, page 107: "Did Mrs. Fayerweather in her lifetime cause an action to be brought against these same defendants who are defendants in this suit wherein she prayed that she might be relieved from the alleged settlement made with her of her interest as widow of Daniel B. Fayerweather? A. She did.

The Witness: Mr. Blaikie, will you see whether that is read right or not?

277

Mr. Parsons: Question No. 353 it is.

Question compared by Mr. Blaikie.

Mr. Blaikie: Same objections.

A. Yes, sir.

553 R-D-Q. Show me any paper in which Mrs. Fayerweather ever made any such prayer?

Mr. Blaikie: Same objection, and as incompetent, irrelevant and immateriai.

A. Do yon mean other than appears in the record?

554 R-D-Q. I do not care where it appears. If you can show me any paper which contains any such prayer on the part of Mrs. Fayerweather as you have testified to have been made by her I want to see it.

278

Mr. Blaikie: Same objections.

A. It is possible that I did not understand the question. I will ask to have it read again, or will you read it Mr. Parsons?

555 R-D-Q. "Did Mrs. Fayerweather in her lifetime cause an action to be brought against these same defendants who are defendants in this suit wherein she prayed that she might be relieved from the alleged settlement made with her of her interest as widow of Daniel B. Fayerweather?" A. Well, I may not be familiar with all the legal terms which you incorporate

in your question, but she did bring a suit in substance to that effect, and began it before her death, and then it was revived by her executors.

556 RD-Q. The term prayer, which I incorporate in my question, has the same signification as when it was put in the question asked by your counsel. Now, I want you to show if you can any paper in which is contained any such prayer, and if you cannot do so, to admit that what you stated in answer to that question was incorrect, was not true.

279

Mr. Blaikie: Same objections.

A. There is nothing incorrect about it; it may not be complete. It is possible the prayer was not made by her before her death.

557 RD-Q. Well, was it made by her after her death? A. By her representatives.

558 RD-Q. Oh, you are talking about the prayer, then, made by John B. Reynolds, are you, while in answer to your counsel you were swearing to a prayer made by Mrs. Lucy Fayerweather? A. Not at all. I was answering as having revived the case as her
280 executor. As John B. Reynolds I have never had any litigation upon the subject.

559 RD-Q. Having testified that Mrs. Fayerweather did bring an action in which she prayed as I have stated, you were next asked this question, No. 354, and to which you gave this answer: "Q. Later, was the complaint in that action amended so as to join Mrs. Achter and Miss Emma S. Fayerweather as complainants with Mrs. Lucy Fayerweather? A. That is my memory." I wish you to produce any complaint in that action or in any action made by Mrs. Lucy Fayerweather.

Mr. Blaikie: Same objections.

A. It is evident that you intend to test my memory as to the history of one case and another, and I, perhaps, can cover the ground by saying that the suit which was revived by her executors was allowed to go by default at an expense to me as executor of between four and five thousand dollars, of which one thousand dollars was extra allowance, which was given to John E. Parsons' firm and one thousand dollars to the firm of Arnoux, Ritch & Woodford, with costs to each of
281 about forty different institutions. That was allowed to go by default for the reason that we could suffer the default and be met as defendants by the colleges in the five college action.

560 RD-Q. My object is not that that you have assumed. It is to show that the testimony which you gave in answer to question 353 and question 354 put to you by your counsel is untrue. It is untrue, is it not?

Mr. Blaikie: Same objections.

At the request of the witness question 560 was repeated by stenographer.

Mr. Blaikie: Would you like to see your an-
282 swers to questions 353 and 354?

Mr. Witness: Yes.

Mr. Blaikie: Will you read them, Mr. Parsons?

Mr. Parsons: Certainly. (Reads).

561 RD-Q. Now, is it not untrue that Mrs. Fayerweather ever made any such prayer or that there was any complaint by Mrs. Fayerweather which contained any such prayer? A. It is not untrue, but the answer is incomplete.

562 RD-Q. Well, the answers are untrue unless you add something to them, are they not?

Mr. Blaikie: Same objections.

A. No, nothing untrue. That would mean intentional perjury, which there was not anything of the kind.

Mr. Blaikie. Oh, no, it would not.

Mr. Parsons: Well, one moment, Mr. Blaikie. We call it intentional perjury.

The Witness: That does not shake me a bit, Mr. Parsons.

283

Mr. Parsons: The matter under consideration at the present time is the testimony of this witness.

563 RD-Q. Have you now made all the answer that you wish upon the subject of the truth or untruth of those answers?

Mr. Blaikie: Same objections.

A. I think my answer clears the situation. If there are any further points about it which you wish me to take up I will now do so.

564 RD-Q. I now take up the irresponsive answer which you gave in which you spoke about suffering a default in some suit, and suffering that default at the expense which you stated, because a suit
284 was to be brought by the five colleges which you could defend or in which you could answer, and I ask you whether you mean to testify that at the time your complaint was dismissed, as stated by you, there was in contemplation or you had heard any intimation that there was to be brought a suit by the colleges?

Mr. Blaikie: Same objection and as incompetent, irrelevant and immaterial.

A. There had been a good deal of consideration on the part of the attorneys, or some of them, on be-

half of the colleges ~~any~~ and myself, and I showed them the evidence which would establish the trust and destroy the deed of gift; it was furnished to the attorneys of Amherst College for one; I think two others; the points on which Mrs. Reynolds could testify, one in particular, the fact that she read to Mr. Fayerweather the night preceding his death the letter of Mr. Ritch to Mr. Fayerweather, which Mr. Vaughan had testified to or claimed that Mr. Fayerweather never saw; that established a trust so fully that the
285 courts decided in their favor and wiped out the deed of gift. That matter was wholly understood by some of the colleges' lawyers before they began their case and before we discontinued that suit or allowed it to go by default.

565 RD-Q. Do you mean that you gave this information to representatives of some of the colleges before your complaint was dismissed in the suit that was brought by you?

Mr. Blaikie: Same objections.

A. Yes, sir.

566 RD-Q. And was it given to them for the
286 purpose of having them commence a suit, the suit which they did begin?

Mr. Blaikie: Same objections.

A. Well, we were in spmpathy with them up to the point of doing away with the deed of gift, and I did not suppose they would be such hogs as they proved to be after we destroyed that and take the whole provision that was in the trough themselves. They would not if it had not been for your stubborness; we might have one-third each, which would have been very agreeable to our side; you might have had a million

dollars and we a million dollars and the colleges a million out of that residue, and I was in favor of that settlement ; but they, seeing they had two decisions in their favor at the time and you being a little obstinate in the matter, would not accept it. I suppose you thought because it came from me it had come from Mr. Root.

567 RD-Q. Are you not perfectly aware of the position that was taken by the executors and their counsel—that is, they wished to put upon the Court the re-
287 sponsibility of determining what should be done with Mr. Fayerweather's estate, and that they took the further position that having made a settlement from which you and others bolted, they would not make a second settlement and run the risk of a second bolt ?

Mr. Blaikie: Same objections, and as incompetent, irrelevant and immaterial.

At the request of the witness question 567 repeated by stenographer.

A. I never knew of any such reason for rejecting it ; it was not given us at the time.

At the request of the witness question 567 again repeated by stenographer.

288

The Witness: I am perfectly aware that it was not their purpose to submit to the action of the Court for the purpose of examining what Mr. Fayerweather's wishes were ; it was their purpose to keep from that Court the vital knowledge which they had in their possession, which Mr. Ritch had from the time he drew the will down to the determination of the trial Court, aud I mean the Truax court, that the whole matter, from the time of drawing the will down to the decision of the Court of Appeals, was nothing

more or less than a bunco game; that Vaughan was the bunco man, with Mr. Ritch and with John E. Parsons to steer him. That is my impression from reading the record of the Surrogate's Court, and it is my opinion now. I may be mistaken, but it is my honest opinion. It is a bunco game supported by the best lawyers, as they thought, to be found in New York.

568 RD-Q. Have you not within the last few minutes sworn that before the commencement of the five colleges' suit you put the representatives of those
289 colleges in information or evidence or facts which would show that there was a secret trust, and which would undo or get rid of the deed of gift?

Mr. Blaikie: Same objections.

At the request of the witness question 568 was repeated by stenographer.

A. I put the best evidence that I could produce to show that, and they concluded that it was sufficient to prove that, and the Court so decided.

569 RD-Q. Have you not within the last few minutes stated as your own opinion that it was sufficient and that you communicated it as sufficient to the representatives of the colleges.

290

Mr. Blaikie: Same objections, and the record is the best evidence of what he stated.

At the request of the witness Question 569 repeated by stenographer.

A. I do not know that I have expressed my opinion in regard to the matter; I have told you the facts as they occurred.

570 RD-Q. Do you remember what, in answer to your own counsel, you stated on the subject of not having in mind at one time or other certain matters bear-

ing upon the establishment of such a trust and defeating the deed of gift?

Mr. Blaikie: Same objections.

At the request of the witness Question 570 repeated by stenographer.

The Witness: Won't you read that again?

Question 570 again repeated.

A. I remember the subject was alluded to in
291 our former testimony, perhaps my former testimony, but I cannot repeat the words.

571 RD-Q. Was not the gist of what you said upon this very examination, in answer to your counsel, that you did not have that in mind until a very late period of the litigation?

Mr. Blaikie: Same objection.

A. I do not think so.

572 RD-Q. If your testimony bears any such construction, is it a mistake, and is it the fact that you had in mind before the commencement of the five colleges' suit that evidence had been disclosed sufficient both to establish a trust and defeat the deed of gift?

292

Mr Blaikie: Same objections.

At the request of the witness Question 572 was repeated by stenographer.

A. I could not answer that question without having my testimony on that occasion read. I do not carry it clearly in my mind what was said about it. I know the subject was alluded to, and I said in my answer that it annihilated the deed of gift; that was the substance of the answer I gave.

573 RD-Q. Do you remember that your counsel on

your previous examination put to you a series of questions upon the subject of what was or was not in your mind at particular times?

Mr. Blaikie: Same objections.

A. He may have done so; quite likely he did.

574 RD-Q. Have you the remotest idea at the present time what those questions contained?

293

Mr. Blaikie: Same objections.

A. I have not the remotest, but I have a very clear one on some of them which related to your testimony before Mr. Dayton; if you refer to that, I have. I can detect any misquotation of them if you want to read them, Mr. Parsons.

575 RD-Q. The question I put to you refers to a series of questions put to you by your own counsel in which he states as to this matter or that that at a particular time it was or was not in your mind—the point is at the particular time it was or was not in your mind. Do you mean what any of those questions incorporated as to what was or was not in your mind?

294

Mr. Blaikie: Same objections.

A. If you read me the particular question that you wish my opinion upon I can give you a perfect answer and would be very glad to do it.

576 RD-Q Is that the best answer you can make?

Mr. Blaikie: Same objections.

A. I think it ought to be all you could require of me, Mr. Parsons.

577 RD-Q. Does it satisfy yourself? A. Yes, perfectly.

578 RD-Q. Were those questions, I mean the questions asked about what was or was not in your mind, prepared in advance of your examination?

Mr. Blaikie: Same objections.

A. What did the questions or answers refer to Mr. Parsons?

295

579 RD-Q. Things as to which you were asked whether they were or were not in your mind?

Mr. Blaikie: Same objections.

The Witness: What is that question?

Question 578 repeated by stenographer.

A. Why, I made a very thorough study of the testimony before Dayton; I think I spent about two days in the Surrogate's office in preparation for it, but I never had any talk with Mr. Sherman, I did not know the subject on which he was going to speak or examine me upon
296 when I came in here and was as much surprised as you were that he called upon me to make those statements. I did not talk with him or see any questions or know of any questions he was going to ask me, I did not think it was necessary.

580 RD-Q. You have testified that before the commencement of the five colleges suit you communicated to representatives of the colleges evidence which showed that there was a secret trust and which was sufficient to defeat or, to use one of your own expressions, to annihilate the deed of gift. Did you get that evidence from the record of the probate trial?

Mr. Blaikie: Same objections.

A. No, sir.

581 RD-Q. Did you get any part of it from the record of the probate trial?

Mr. Blaikie: Same objections.

A. I think my information came largely from the evidence which Mrs. Reynolds gave on the trial before Judge Truax; the principal thing to which I re-
297 ferred definitely in my answer was the fact that she read the letter which Mr. Ritch wrote to Mr. Fayerweather and came to her on the evening before his death to Mr. Fayerweather.

582 RD-Q. When did Mrs. Reynolds give you that information?

Mr. Blaikie: Same objections.

A. Well, there is scarcely a day, excepting Sundays, that I have not got information from her, Mr. Parsons.

583 RD-Q. When did she first give you that information?

Mr. Blaikie: Same objections.

A. I could not say that.

298

584 RD-Q. Before or after you were married? A. Oh, after I was married. I never mentioned the subject to either her or Mrs. Fayerweather until after our marriage.

585 RD-Q. How long after the commencement of the five colleges suit? A. My impression is that it was after the revival of the suit by Mrs. Fayerweather's executors.

586 RD-Q. Have you any objection to mentioning the name of Mrs. Fayerweather's executor? You speak about somebody as being the executor of Mrs. Fayer-

weather without mentioning his name? A. At first, until we got the will probate nearly carried out, practically fully so except the residuary estate, it was Morris B. Beardsley and John B. Reynolds.

587 RD-Q. Did there come a time when it was not Morris B. Beardsley and John B. Reynolds?

Mr. Blaikie: Same objections.

A. Yes, sir.

588 RD-Q. When did that time come?

299

Mr. Blaikie: Same objections.

A. I do not remember the date, but some three or four years ago now, I should think.

589 RD-Q. How shortly after Mrs. Fayerweather's death?

Mr. Blaikie: Same objection.

A. Well, I should think within two years. It might have been over two years.

590 RD-Q. You have testified that at an early period you read the probate record. In reading that did you not notice that Mr. Vaughan testified to his conversation of November 15th, 1890, with Mr. Fayerweather,

300

both in answer to questions put by Mr. Parsons and to questions put by Mr. Coudert?

Mr. Blaikie: Same objections.

A. Yes, I think I noticed the fact.

591 RD-Q. Did you not also notice that on the probate trial there were put in evidence the memoranda and papers upon which in the five colleges suit it was decided that there was a secret trust?

Mr. Blaikie: Same objections.

A. There were quite a number in the Surrogate's or

probate trial that were also introduced in the five college action.

592 RD-Q. Did you not learn from the probate record that the counsel for the executors took the position before the Surrogate that the question of trust, secret or otherwise, or no trust, was not before him, but that the probate contest was upon the question of will or no will?

Mr. Blaikie: Same objections and as incompetent, irrelevant and immaterial and incompetent under
301 the plea.

At the request of the witness Question 592 was repeated by the stenographer.

A. I noticed Judge Rollins in his argument before the Surrogate——

593 RD-Q. I am asking about the counsel for the executors and not about Judge Rollins, unless you testify that Judge Rollins was of counsel for the executors. A. (Continuing.) Had asked for information of the executors and from Mr. Parsons, and he remarked that he was groping in the dark, that was their position, and the executors were denying most emphatically that there was any trust, as they did before the
302 Court that tried what was called the five college case, every one of them swearing that there was no trust, and trying in all their ingenuity to twist every exhibit which you refer to into meaning that there was no trust. Mr. Ritch expressly so. And I felt and I now feel that he knew when he drew that will for Mr. Fayerweather that it was a rope of sand without the releases of Mrs. Fayerweather and those nieces, and he lost no opportunity until he obtained them ; it was his plan when he drew the will, it was his plan when he put into the will the clause relat-

ing to Miss Joyce, as long as she should remain single. It was not in the will of 1880 that Mr. Fayerweather made and understood. Mr. Ritch told Miss Joyce, now Mrs. Reynolds, before he read the will in the parlor, that he supposed when he read the will to Mr. Fayerweather that he did not notice it. I have examined the record very carefully and I find that Mr. Ritch says that he made a pencil memorandum on the will of 1880, and that pencil memorandum appears in print in the five college action as an interlineation. A casual
303 observance of it would imply that it was in that 1880 will. When Mr. Fayerweather had his will read to him, he said: "I never did that," and Mr. Ritch says, "I now know that he could not have done it" to Mrs. Reynolds.

594 RD-Q. Do you consider this answer as responsive to my question?

Mr. Blaikie: Same objections.

A. Well, I can make it more so if you particularize.

595 RD-Q. Do you consider it responsive to my question? A. I do not see how you could ask it any more so.

596 RD-Q. I repeat the question to you.

304

Question 592 repeated by stenographer.

Mr. Parsons: Answer, please.

The Witness: He said it was not before him.

597 RD-Q. Not before the Surrogate? A. The Surrogate said it was not before him.

At the request of Mr. Parsons, Question 592 repeated by stenographer.

The Witness: Well, I do not think I studied to find out what their particular view was upon that subject.

598 RD-Q. Did you not learn what the question asks?

Mr. Blaikie: Same objections.

A. I do not think I did, if I properly weigh the question and understand it.

Mr. Parsons: We move now to strike out the long answer last given by the witness, upon the ground that it is irresponsive in that now we understand him to state that he was not able to answer and did
305 not understand.

Mr. Blaikie: Counsel for complainants objects to striking it out and also asks that the witness have an opportunity of completing his answer, as he had not finished it.

The Witness: Those were the things which I learned in studying the proceedings before the Surrogate, and the opinions that I had in regard to that, most of which have been demonstrated to be correct by the General Term and the Court of Appeals, and would have been probably by the trial Court if he had considered the very interesting questions propounded in behalf the widow and next of kin. The words
306 "Considered the very interesting question propounded in behalf of the widow and next of kin," I think should be quoted; I have tried to quote Judge Truax' words. Each of the other courts, the General Term and the Court of Appeals, decided there was a trust and that immediately upon the death of Mr. Fayerweather one-half of the estate belonged to his widow and next of kin, and some person or persons outside of themselves are now responsible to them for its diversion.

599 RD-Q. Was that your contention?

Mr. Blaikie: Same objections.

A. At what time?

600 RD-Q. Well, if by your answer you mean to have me locate any particular intentions which you had at any particular time, it is impossible; all I can do is to ask whether you ever made that contention.

Mr. Blaikie: Same objections.

A. Well, it coincides very closely with my opinion in regard to the matter.

307

601 RD-Q. When did you through your counsel make that contention?

Mr. Blaikie: Same objections.

A. Well, this is a history which has grown upon me, step by step, increasing day by day for the last eight years.

602 RD-Q. Go back of the last eight years and go to the suit as to which you have testified that it contained a prayer by Mrs. Fayerweather, and as to which you have also testified that the original complaint was subsequently amended, and amended by her executor. Were you the executor and did you make that contention in that suit?

308

Mr. Blaikie: Same objections.

A. I probably made the prayer in behalf of Mrs. Fayerweather as executor, in behalf of her estate.

603. RD-Q. My question is whether you made that contention in that suit.

Mr. Blaikie: Also that the pleading in that suit is the best evidence of what he contended in it.

A. Probably there were some points in that suit

which were set out in it which I have alluded to in my previous answer.

604 RD-Q. In other words —— A. Hold still. I have not got through that yet.

605 RD-Q. Go on. A. But not all of these facts perhaps had come to me at that time, probably not.

606 RD-Q. Does not that contention, the contention which was stated by you, which was volunteered by you in a late answer, come down to this, that Mr. Fayerweather had made a will and certain codicils
309 and that, interpreted in connection with certain memoranda by him and correspondence between him and Mr. Ritch, there was shown to have been a trust, the effect of which was that as to one-half of Mr. Fayerweather's estate his will was invalid and that one-half would go to his widow and next of kin?

Mr. Blaikie: Same objections and as calling for a conclusion.

At the request of the witness Question 606 was twice repeated by stenographer.

A. That was at one time my opinion, in which Judge Truax did not agree with me, and the General Term did not agree with Judge Truax so far as the nieces
310 were concerned, or Mrs. Fayerweather either, but they decided that the widow was entitled to raise the question of the Act of 1860 as applying to the estate, but the nieces were not. My opinion did not agree with that of either Judge Truax or the general Term, but I did not know that I was not wrong until the Court of Appealstold me that I was not. They decided in accordance with my view and that was the first time I knew it, and I guess the first time any of the rest of us knew it.

607 RD-Q. Do you remember that in your complaint, which you have stated to have been dismissed because

you would not prosecute it, you alleged, and that in your answer in the five colleges' suit you also alleged, that Mr. Fayerweather left a will and five codicils, one being a codicil bearing date November 15, 1890, of which you attached a copy?

Mr. Blaikie: Objected to on the same grounds. The papers referred to are the best evidence as the answer would not be.

At the request of the witness, Question 607 repeated by stenographer.

311

Mr. Blaikie: Do you remember, he asked you.

A. I do not remember it.

608 RD-Q. Have you any memory upon the subject?

Mr. Blaikie: Same objections, and as incompetent, irrelevant and immaterial.

A. I have a memory that there have been five codicils purporting to be the codicils of Mr. Fayerweather, one of them Mr. Vaughan said he destroyed illegally—he did not say illegally, but such I understand was the fact—when Mr. Fayerweather was dying, and substituted the one which you refer to as the Codicil of the 15th which Mr. Fayerweather is claimed to have
312 signed. When that complaint was drawn I had never seen that codicil, and if I called it a codicil then it was because I had not seen the signature. I should never have called it Mr. Fayerweather's codicil if I had seen the signa-ture.

609 RD-Q. Cannot you remember the positions which, from time to time, you have taken in this Fayerweather litigation?

Mr. Blaikie: Same objections, and as incompetent, irrelevant and immaterial, and not the best evidence; the best evidence is stated in the papers.

At the request of the witness, Question 609 repeated by stenographer.

A. Generally, yes.

610 RD.Q. How many different and inconsistent positions have you taken from time to time?

Mr. Blaikie: Objected to on the same grounds, the paper is the best evidence, there is no proof yet that there have been any inconsistent positions taken, and no foundation laid for the question.

313

A. I may have taken some action on an opinion at one time which might be good or bad as relates to the executors, and later on found it not to be good or well founded; I do not say if I have or not, but human nature is fallible.

611 RD Q. In each case stating your position under oath in a sworn pleading?

Mr. Blaikie: Same objections. The pleading is the best evidence of how he stated it.

A. I could not answer that without seeing the different pleadings, Mr. Parsons.

314

612 RD-Q. Did you always swear to your pleadings?

Mr. Blaikie: Same objections. The pleadings are the best evidence.

A. It is quite probable that I did.

613 RD Q. Is there not one notable case in which you did not?

Mr. Blaikie: Same objection and as incompetent.

A. There may have been several.

614 RD-Q. Is there not one notable case in which you

did not? A. If there is, I am ready to swear to it now, Mr. Parsons.

615 RD-Q. Is there not one notable case in which you did not?

Mr. Blaikie: Same objections.

A. Well, I could not say if it is so or otherwise.

616 RD-Q. I make no question about your willingness to swear to anything, but the point is whether you have not now in mind a case in which you abstained
315 from swearing to the complaint. I refer to a suit for damages brought in your name and to which were joined as parties defendant the executors and their counsel personally and others?

Mr. Blaikie; Objected to as incompetent, irrelevant and immaterial and not the best evidence. You say, brought in his name?

Question 616 repeated by stenographer.

Mr. Parsons: Leave out "brought in your name." Mr. Blaikie makes some question about that.

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial, the paper which is referred to will show and is the best evidence, and also as going into transactions between counsel and client; and objected
316 to on the grounds stated under Section 829 of the Code, and I advise the witness not to answer.

The Witness: Under advise of counsel, I decline to answer.

617 RD-Q. You have already answered. A. If I have neglected to do anything of that kind, I think I should be very glad to do it to-day, Mr. Parsons, or very willing to.

618 RD-Q. How many suits were brought by your procurement against the executors and their counsel for damages?

Mr. Blaikie: Objected to as incompetent, irrelevant

and immaterial and not the best evidence, and no foundation laid for it, and no evidence that he has brought any suits; any suits which have been brought have not been brought in his name, and anything which he knows about them is protected and privileged under the relation of counsel and client; and I advise the witness not to answer that question.

The Witness: Under advice of counsel I decline to answer.

317

619 RD-Q. Were there such suits brought by you in the names of Miss Emma S. Fayerweather and Mrs. Achter.

Mr. Blaikie: Same objection. Do not answer the question.

The Witness: Under advice of counsel, I decline to answer.

620 RD-Q. Were the suits referred to brought under an arrangement between you and Miss Emma S. Fayerweather and Mrs. Achter?

Mr. Blaikie: Same objections, and I advise the witness to decline to answer.

The Witness: And I so decline.

318

621 RD-Q. What arrangement, if any, has been made between you and Miss Emma S. Fayerweather and Mrs. Achter, either or both, with reference to protecting them against suits maliciously brought and maliciously prosecuted by you in their names?

Mr. Blaikie: I make the same objection and give you the same advice.

The witness: And I so decline.

622 RD-Q. Have those ladies, either or both, had anything personally to do with the commencement of the suits to which I have referred, I mean suits brought by

you in their names, joining as parties defendant the executors and their counsel, and claiming damages?

Mr. Blaikie: I make the same objection and I give you the same advice.

The Witness: And under advice of counsel I decline to answer.

623 RD-Q. What, if anything, was said by you to anybody before the commencement of those suits to the effect that you held the executors responsible for preventing a settlement about which you have
319 previously testified which would have given you a million of dollars, them a million of dollars and the colleges a million of dollars, and that you would pursue them by litigation which would be so offensive that in the end you would force them and their counsel to compromise.

Mr. Blaikie: I make the same objections and give you the same advice.

The Witness: And under the advice of counsel I decline to answer.

624 RD Q. Did you have anything to do with the publication of a malicious pamphlet attacking Mr. Ritch?

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial, and I advise the witness not to answer.

320

The Witness: And so I decline.

Mr. Blaikie: There has no foundation been laid for any such question. I also add that to my objection. It has nothing to do with the issues in this action.

625 RD-Q. Is it not a fact that by your procurement Mrs. Achter and Miss Emma S. Fayerweather have been prevented from obtaining any of the money or property belonging to their uncle, Mr. Daniel B. Fayerweather, which came to his widow, either by his will or by settlement with the executors; that by your procurement all

of that property, or substantially all of that property has gone to your own wife, and that an arrangement has been made between you and them that if you could coerce anything by way of settlement from the existing litigation, you were either to have the whole of it or a large part of it?

Mr. Blaikie: I make the same objections and I give you the same advice, to decline to answer no matter how much you may want to.

321

At the request of the witness, Question 625 repeated by stenographer.

The Witness: Well, I want to most exceedingly.

Mr. Blaikie: Well, I advise you not to.

The Witness: I shall have to take his advice. I feel like a bulldog when he is withheld from confronting his enemy.

626 RD-Q. Is the suit brought by you against the executors, as to which you have testified that it was dismissed because you would not prosecute it, the only suit brought by you or by your procurement which has been dismissed for want of prosecution?

322

Mr. Blaikie: Objected to on the same grounds and I give the witness the same advice.

The Witness: I decline to answer.

627 RD-Q. Is not this the situation of the Fayerweather litigation from the beginning to the end, that whenever you have been willing to stand fire, the Court has decided against you, and that in the cases in which the Court has not decided against you you declined to stand fire, and the Court dismissed suits brought by

you or through you because you would not prosecute them?

Mr. Blaikie: Does this refer, Mr. Parsons, to the trial before Judge Wheeler?

Mr. Parsons: Answer, please.

Mr. Blaikie: I make the same objections and I give you the same advice. I notice Mr. Parsons does not hurry to give that answer.

The Witness: And under the advice of counsel
323 I decline to answer.

628 RD-Q. When did you first have it in mind that for any purpose it occurred to you that some advantage would be gained to you if you made as parties defendant, or procured to be made as parties defendant in a suit, the counsel for the executors as well as the executors?

Mr. Blaikie: The same objection and the same advice.

The Witness: Will you excuse me if I have a word with my counsel?

Mr. Parsons: No.

Mr. Blaikie: That is not allowable. Mr. Parsons is right about that, Mr. Reynolds.

324

The Witness: I think you would get more answers if you did, Mr. Parsons.

Question 628 repeated by stenographer.

Mr. Blaikie: Same objections and same advice.

The Witness: Under advice of counsel I decline to answer, notwithstanding the question implies many things that are false in my opinion and I think I can prove them to be so.

629 RD-Q. Do you mean that you never had that in mind?

Mr. Blaikie: Same objection and same advise.

The Witness: I decline, under advise of counsel, to answer.

630 RD-Q. Have you any personal knowledge of any of the matters in respect of which you were asked upon examination by your own counsel whether they were or not in your own mind?

325

Mr. Blaikie: Same objection and same advise.

Question 630 repeated by stenographer.

The Witness: Under advise of counsel, I decline to answer.

631 RD-Q. Do you know what you swore to in answer to such questions?

Mr. Blaikie: Same objections. The record is the best evidence.

The Witness: Same advise?

Mr. Blaikie: No; I won't give you the same advice there.

326

At the request of the witness, question 631 repeated by stenographer.

A. I suppose I know the general tenor of it; I do not recall the words of the question or answer; the question or questions or answer or answers.

632 RD-Q. Do you know the general tenor of those questions; I mean the questions which ask about the condition of your mind at one time or another?

Mr. Blaikie: Same objections.

A. I have not the slightest impression in my mind of what you refer to.

633 RD-Q. From time to time during your examination, reference has been made to your counsel. Has there been a change from time to time in the personnel of your counsel? A. If you mean from the beginning of my experience in this matter——

634 RD-Q. I mean from the death of Mr.
327 Fayerweather? A. Yes, sir; there has been a change in counsel since the decision of the Court of Appeals in the five college action.

635 RD-Q. Was there not a change before that? A. I think Senator Edmunds was early in the case.

636 RD-Q. Did he go out? A. He was unable on account of the illness of his daughter to give the matter attention so fully as he thought it required.

637 RD-Q. Do you not know that Senator Edmunds has been giving active attention to law business during all that period? A. No; I know he has not; I know he went ta California, and I gave him special instructions
328 as to where it would be pleasant and agreeable to his family to go, and even selected the rooms for him while he was there, and corresponded with him more or less while he was there all the winter.

638 RD-Q. Did you ever see him in his house on Spruce street in Philadelphia? A. No, sir.

639 RD-Q. Did you ever see him in Philadelphia? A. No, sir.

640 RD-Q. Do you know when he got back to Philadelphia? A. When he got back from California to Philadelphia?

641 RD-Q. Yes? A. I know he came back there and took the business of counsellor, at least I understand he has, as counsellor to the Pennsylvania Railroad.

642 RD-Q. Has he not been engaged pretty actively in the law business ever since?

Mr. Blaikie: Same objections and as incompetent, irrelevant and immaterial.

A. I have not heard of his having any other law business, although he may have had and I may have heard it, but I do not remember of having heard.

643 RD-Q. Were not Mr. Coudert and Judge Rollins originally employed?

Mr. Blaikie: Objected to as immaterial.

329

A. I understand they were in the Surrogate's Court.

644 RD-Q. Has not Mr. Blaikie been employed, Mr. William Blaikie? A. Yes, sir.

645 RD-Q. Was not Colonel Edward C. James and his office at one time employed? A. Yes, sir.

Mr. Blaikie: Not his office.

646 RD Q. And did his employment continue until after the decision of the Court of Appeals? A. Col. James was offered by the executors of the representatives of the colleges a fee of $10,000, and Mr. Blakie was offered a fee of $10,000, and they proposed to increase the annuity of Mrs. Reynolds $2,000 a year, and to give me a moderate consideration, after the
330 decision of the Court of Appeals, I suppose, in consideration of their expectancy, that probably it would require that no further litigation would be had. They objected to giving the nieces anything. Col. James advised the acceptance of it. I was with Martin Cooke, the counsel of Rochester University, in the office of Col. James after having a meeting with them at the Astoria Hotel the evening before, and Mr. Cooke was there to get my answer. My answer was, "Colonel James I appreciate your efforts in this case; I know you have worked hard and well, and it is with great reluctance that I have to

decide and that I must decide as I do. I appreciate Mr. Blaikie's efforts. I know that both of you would feel very much gratified to get this check for $10,000 each. I want the services of both of you to continue, but if you both lie down and not follow it any further, under those conditions I shall not." Mr. Blaikie was not present. I went to him and asked him what his advice was as to the acceptance of that, without telling him what experience I had had at the Waldorf-Astoria or at Col. James' office, and Mr. Blaikie says, "I
331 admire your position, Mr. Reynolds; you know how convenient the $10,000 check would be to me, but I cannot advise you to accept it."

647 RD-Q. Did you admire Mr. Blaikie as well as Mr. Blaikie admired you? A. I hope so, I hope it is mutual.

648 RD-Q. Your preceding answer says that Col. James was offered by the executors or the representatives of the colleges, which do you mean? A. Well, I inferred it was from both, and with Mr. Cooke was the party who did the talking with me and with Colonel James.

649 RD-Q. State anybody, state any executor or anybody assuming to represent the executors who ever made any such proposal or to your knowl-
332 edge ever heard of such proposal until this moment? A. Mr. Cooke had conferences, I suppose, I had no reason to know otherwise, with the representatives of the colleges, Mr. Ritch representing some and you some and he one, and Mr. Root others, Putney & Bishop others, and he was the medium of negotiation; and I said to him "Mr. Cooke, there has been a gross crime committed here, and I believe there is a balm in Gilead and a physcian somewhere that can heal this wound, and it never will be healed until it is healed right; there will be no scab on it when it is healed right"; and if you think there has been any suit brought against you and

the executors for the purpose of settlement, you are entirely wrong and you had better get on the other track about as quick as you know how, that is my advice.

650 RD-Q. Would you not like to add something to that answer? A. I will, if it will please you. I would do almost anything to gratify you.

651 RD-Q. Oh, no, you and I both know that it is a violation of every rule of examination to bring offensive matter of this character into the record. A. This
333 is the first time that we have had an opportunity of letting the full sunlight into this deviltry, and I do not propose to lose a particle of opportunity to set it right so far as I am concerned, because I do not know whether I will ever have another.

652 RD-Q. Now I ask you whether you have stated the best justification which you can for incorporating the executors into your preceding answer, so as to assume or imply that the executors had anything to do with any such proposal? A. Of course, I did not come in contact with any of the executors, but they being attorneys for several of the colleges, I mean Arnoux, Ritch & Woodford and Mr. Parsons representing them in the case with two or three others, I concluded
334 that Mr. Cooke was speaking to me with authority or he would not part with the money to so large an extent.

653 RD-Q. And upon that you feel justified in swearing under oath, as you have done just now, that the executors had to do with such a proposal? A. I have not sworn to any such thing.

654 RD-Q. The record will show whether you have or have not sworn to it? A. I have said what I supposed came from the executors or the attorneys of the colleges; and the attorneys for the colleges would include Mr. Parsons and Arnoux, Ritch & Woodford, to the extent of probably 20 to 25 per cent. of the whole;

that is according to my recollection; and I concluded that Mr. Cooke would not make a definite proposition to me without having authority, because he only represented one college.

655 RD-Q. Of course, you know that Mr. Cooke cannot be heard upon this subject, he being dead? A. Well, I suppose not directly in court.

656 RD-Q. Now name any living person who said anything to you which furnishes a justification for that answer which undertook to put upon the executors
335 the responsibility or authority for any such proposal? A. Colonel James heard all there was said in his office on that occasion.

657 RD-Q. Did Colonel James tell you that any such proposal either came from or was known to the executors? A. I do not think we segregated the particular parties in interest as being executors or representatives of the colleges.

658 RD-Q. And yet, having no knowledge upon the subject, and Colonel James telling you nothing upon the subject, you a short time ago swore that the executors had to do with that proposal; is that the fact? A. I did not swear to anything of that kind.

336

Mr. Blaikie: He did not swear to anything of the kind. Have the record read if you want it.

Mr. Parsons: I have had the record read.

Question 658 and the answer thereto repeated by stenographer.

Mr. Blaikie: What is your answer?

The Witness: I say that I do not understand that I have sworn to the executors or any particular college representative, except as came to me purporting to be a proposition from the colleges, and I understood was recommended or assented to by the executors.

659 RD-Q. Name any living person whoever told you anything to the effect that such a proposal was recommended by the executors or known to the executors, or ever heard of by them or by their counsel until to-day.

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial and no foundation having been laid for it. He has not testified that the executors ever told him anything of the kind or knew anything about it.

At the request of the witness, Question 659 repeated by stenographer.

337

A. I think I have given you all the source of knowledge that I have on the matter. I would like to add more to that answer if you will read the question again.

Question No. 659 repeated by stenographer.

The Witness: The names of quite a number of people who were in the case as counsel were mentioned and their opinions quoted. The particular ones I do not now remember.

660 RD-Q. Did the probate record inform you that on February 18, 1891, Mr. Coudert made before the Surrogate an argument which began (fol. 1641):

338

"Mr. Coudert: If your Honor please, my asso-
"ciate and myself, after consultation with our
"learned friends on the other side, desire to pre-
"sent to you, if you will hear us, some arguments
"to show that upon their own proofs these papers
"ought not to be admitted."

That in the course of Mr. Coudert's argument he said (fol. 1663):

"Now, what are the circumstances here? We
"have a testator. A business man, a prosperous

" man with growing wealth, apparently not a man
" himself of very large education, but perhaps for
" that reason all the more anxious to link his
" name with the great institutions of the land and
" to enable men in his own—commencing as he
" did in a humble way—to get the benefit of
" learning. That was in his mind many years.
" He meant that the bulk of his estate should go
" to institutions of learning, and we have in evi-
" dence now to-day that he never faltered in it
339 " and that he never gave up the cherished pet
" scheme of his life."

The Witness: What is the question?

Mr. Blaikie: Take it as Mr. Parsons quoted it.

The Witness: No, I would not want to take it as Mr. Parsons quoted it.

Question 660 repeated by stenographer.

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial.

A. I find those words in the probate record.

661 RD-Q. As of that date? A. I do not know about the date

340

662 RD-Q. Well, look at page 499? A. And in the main I think Mr. Coudert made a truthful statement, except about Mr. Fayerweather's education. While not a college education, it was not inferior to Mr. Coudert's or any other man's in New York, to an extent which would make him a very welcome guest in the home or in the club of any officer of the United States or in his business. He was a thoroughly educated man as we understand education. More so than half of the presidents of the colleges to whom he gave his money.

There probably is not one in the whole lot of them that was as well educated in the line to which he was devoting his life as he was in his line, or so well known throughout the country and largely throughout Europe.

663 RD-Q. Have you yet testified that that argument was made by Mr. Coudert on February 18, 1891; I want to fix the date? A. I say I read those words by Mr. Coudert on that date. I have not got through with my answer yet.

341

664 RD-Q. Well, go on. A. As I understand the position of his widow and of his nieces, they have never wished to defeat the known will of Mr. Fayerweather, and as executor of Mrs. Fayerweather I have no such desire. I feel that Mr. Fayerweather, as I expressed before, was buncoed on the day of his death, that his true will was burned on that day, and that if it was known, there is not a niece or anybody representing the widow would to-day wish to change his will. I believe that in that codicil which Mr. Vaughan destroyed on that day he made abundant provision for his widow and for his nieces. I believe that he put into it a clause in substance that they must be per-

342 fectly satisfied, and when they were satisfied the remainder was to go to those colleges. There is not one of them, so far as they have ever expressed their opinions to me, that would be piggish enough to take it all if the doors were thrown open to them. They are better than the colleges in that respect; they, with the executors, did keep from Mrs. Fayerweather the necessary bread of life, up to the time they got those releases. Mr. Ritch knew at the time he drew this will and all through the the State courts up to the Court of Appeals of this fraud, and I beleive that no man knows it better than John E. Parsons, and that Mr. Vaughan betrayed

him, that he was a friend of Mr. ~~Fair~~Fayerweather's, apparently a true friend up to the Friday preceeding his death, that then he went down to Mr. Ritch's office—while they deny it the circumstances are so clear to my mind that it seems impossible to come to any other conclusion—that he and Ritch then planned that there should be another codicil made, of which Mr. Vaughan never said one word to Mr. Fayerweather, that is, of making Mr. Vaughan a residuary legatee. My conclusions are based upon the fact that Mr. Vaughan
343 never said anything about a codicil in the family that day it was "a paper" and he made arrangements for witnesses to sign a paper. Mrs. Fayerweather and everybody in the house were thinking of their dying husband and brother and employer, no thought of business or anything else entered the minds of any one of them. Mr. Vaughan was the engineer, he was the bunco man, and anything that Mr. Vaughan said, being entirely without suspicion as to him, because Mr. Fayerweather in his dying moments after Vaughan had gone down to Ritch's office, gave Mrs. Fayerweather and Miss Joyce then, now Mrs. Reynolds, instructions to rely on his old friend Mr. Vaughan, he did not know that he had gone down there to betray him as it
344 proved. He told them things which is perfectly convincing, at that time, and if Mr. Ritch, or Mr. Vaughan knew it to be otherwise, Mr. Ritch would have come up there himself to execute that codicil which Mr. Fayerweather, as he says, wanted to make, and to make himself clean and clear before his wife and Mrs. Reynolds. He had forbidden even the house to Ritch, he said he could not bear the sight of that man. Now those things have come to me through the source of information of which you have questioned me and I believe them to be true.

665 RD-Q. Have you any personal knowledge about

any of them? A. The best possible knowledge circumstantially.

666 RD-Q. Have you any personal knowledge about any of them? I have knowledge that is so sure to me that I would be willing to stake my eternal happiness upon it.

667 RD-Q. In other words, you would be willing to swear to what you do not know to be true? A. I am not swearing to it, I say that my faith in the sources from which I received this information is so undoubted that no other conclusion on my part is possible to reach.

345

Mr. Parsons: We move to strike out all the preceding statments made by the witness as being in manifest and willful violation by him of his duty as witness, and as obviously made for the purpose of getting upon the record statements which he concedes that he knows nothing about. which, according to his own claim, were made to him by persons whose names are not mentioned and which are entirely irrelevant to the issue.

Mr. Blaikie: Counsel for complainants wish to note that the witness has made no such concession. Let the Court determine that.

346

668 RD-Q. Mr. Reynolds, the position stated by Mr. Coudert upon the 18th of February, 1891, as testified by you, is the position which you took in the suit which you brought which was dismissed for want of prosecution, and the position which you urged upon the colleges in the interview which you had with their representatives before the commencement of the five colleges suit, is it not?

Mr. Blaikie: Objected to as incompetent and irrelevant and immaterial, and not the best evidence.

At the request of the witness, Question No. 668 repeated by stenographer.

A. I do not know to what extent it would be in harmony with Mr. Coudert's speech, and I should want to read the complaint over carefully and compare it with it.

669 RD-Q. I am not speaking about your complaint necessarily. I am speaking about the position which you stated that you took when you went to see the representatives of the colleges before the com-
347 mencement of the five colleges suit. Is not that the same position which Mr. Coudert argued for before the Surrogate in the passage to which you have testified?

Mr. Blaikie: Same objections.

A. I have not testified that I ever went to see the colleges or their representatives before the suit. I say most distinctly that I never did.

670 RD-Q. Did you testify to what happened between you and representatives of the colleges before the commencement of the five colleges suit? A. I may have done so, but I did not say I went to see them; they came to see me.

348

671 RD-Q. What I am trying to find out now is whether the position which you took and urged upon them is not the same as that which was urged by Mr. Coudert before the Surrogate in the passages as to which you have testified.

Mr. Blaikie: Same objection, and not the best evidence; the record will show what Mr. Coudert said better than you can remember it.

A. Well, it may have been to some extent. I cannot tell to how great.

672 RD-Q. How long have you, John B. Reynolds, been engaged in trying to defeat what Mr. Coudert urged before the Surrogate was the cherished pet scheme of Mr. Daniel B. Fayerweather during all his life?

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial and no foundation laid for it, and I instruct the witness to decline to answer.

At the request of the witness question 672 repeated by stenographer.

349

The Witness: I want to add that Mr. Coudert was totally in error——

Mr. Parsons: I object to your adding anything, I want you to answer this question or to decline to answer it.

The Witness (continuing)—in his referring to Mr. Fayerweather as having a desire to immortalize his name by anything that he should give to those colleges. It was, so far as I am informed, and I believe that I am truthfully informed, repulsive to him and he would much rather the whole matter should have been given to the colleges, as was his intention, without having his name known, then or forever after; that was Mr. Fayerweather's wish, and Mr. Coudert was in that respect in error, which was quite natural because he never saw Mrs. Fayerweather but a very little to talk with her on the subject, and if he was not more correct in the other things which Mr. Parsons has quoted, it is possible that he was in error as to them.

350

673 RD-Q. According to your testimony, you and Mr. Coudert entertained the same opinion about Mr. Fayerweather's wishes, and you entertained the further opinion that these wishes of Mr. Fayerweather were in violation of law, is not that so?

Mr. Blaikie: Same objections.

A. So far as Mr Fayerweather's wishes are known, I do not think they now or ever have been in conflict with his widow or his next of kin.

674 RD-Q. Do you know what you swore to upon the subject of Mr. Fayerweather's wishes in your complaint in the suit brought by you which was dismissed for want of prosecution, and what you swore to about Mr. Fayerweather's wishes in your answer to the five colleges suit, and about those wishes being in violation of law?

351

Mr. Blaikie: Do you know, he says.

Mr. Parsons: Yes, that is my question. I want to find out whether he is testifying with or without knowledge.

Mr. Blaikie: I am not objecting, Mr. Parsons.

A. I do not now recall what the particular accusations were.

675 RD-Q. Are you not aware that as the litigation——

352 The Witness: I have not got through with that answer. But so far as my knowledge then was, I believed them to be true at that time. I have learned many things since.

676 RD-Q. Are you not aware that as the litigation now stands there has gone to the colleges by the decision of the Supreme Court and of the Court of Appeals what, according to Mr. Coudert's argument and your position, it was the cherished wish of Mr. Fayerweather that they should receive?

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial.

At the request of the witness, Question 676 repeated by stenographer.

A. It is my understanding and belief, from what knowledge I have, that the true wishes of Mr. Fayerweather are only known to Mr. Vaughan, Mr. Butler, and, possibly, to Mr. Vaughan's counsel, Mr. Parsons. When the burned codicil shall be fully disclosed, then, and then only, will the true wishes of Mr. Fayerweather be made known.

353

677 RD-Q. Did you not, on August 16, 1893, in your answer in the five colleges suit, swear in these words:

"Seventh. That it was the intention and purpose "of the said Daniel B. Fayerweather to devise and "bequeath the largest part of his estate to benevo. "lent, charitable, literary, scientific, religious and "missionary societies, associations or corporations f"

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial, and not the best evidence, and I instruct the witness not to answer.

The Witness: Under advice of counsel, I decline to answer.

354

678 RD-Q. Is it not the fact that the exception to the accomplishment of these wishes of Mr. Fayerweather is in the $225,000 which, in the settlement, went to Mrs Fayerweather, the house No. 11 East Fifty-seventh street and the stable No. 149 East Fifty-seventh street, aside from what was received by Miss Emma S. Fayerweather and Mrs. Achter; and that the outcome has been that with that exception—I mean to say that what went to those two ladies—what did not go to the colleges has in some way worked around that now it has gone away

from the Fayerweather family and is kept by you and Mrs. Reynolds?

Mr. Blaikie: No objection.

A. No, there are several items——

679 RD-Q. That you have not grabbed? A. There have been other grabbers as well as myself, if you so classify me, and Parsons, Shepard & Ogden, and Arnoux, Ritch & Woodford, have been a great deal
355 more successful than I have been in grabbing; they have got more, or I believe they have got more from the Fayerweather estate than the two nieces whom I represent, or who have been advised by me and Mrs. Fayerweather, combined, and I see no reason why they should be so bountifully provided for, and these poor nieces be deprived of what legally belongs to them, and what I believe Mr. Fayerweather abundantly provided for them in that burned codicil which your client has destroyed.

680 RD-Q. What Arnoux, Ritch & Woodford and Parsons, Shepard & Ogden have received has been received, has it not, as the value of services rendered by them and approved against objection on your part by the Supreme Court and the Surrogate's Court?

356

Mr. Blaikie: No objection.

A. I regard that as a successful effort in a bunco game.

681 RD-Q. You mean the decision of the Supreme Court and of the Surrogate's Court? A. I mean the contest on the allowance of those lawyers' fees.

682 RD-Q. Now who were the parties to that bunco game? Was Mr. Scott Lord one? A. Well, I think he was overawed by your presence, Mr. Parsons.

683 RD-Q. And was Mr. Charles W. Dayton one? A.

I cannot say that I think Mr. Dayton was overawed. I think that he was too companionable.

684 RD-Q. And the Judges of the Supreme Court? A. You are asking me a question as to who; now allow me to say who.

685 RD-Q. No, I ask you whether as participants in what you on oath swear to as a bunco game were Judges of the Supreme Court and the Surrogate. A. By no means.

357

686 RD-Q. Did they not approve the compensation to the lawyers? A. I believe that they were deceived, and that is why these suits are now pending; that this judgment in the Surrogate's Court was obtained by fraud, and I think we have or will abundantly show it.

687 RD-Q. Were you not——? A. Hold still, I am not through, Mr. Parsons.

Testimony repeated by stenographer.

688 RD-Q. Are you through? A. Well, I guess I will take another heading for the rest of it, Mr. Parsons.

689 RD-Q. Well, I will give you the other heading.

358 During these proceedings which you describe as a bunco game and which concerned judges of the Supreme Court and the Surrogate, and referees appointed by them, were you represented by counsel to see to it that the Court was not deceived and that the lawyers were deprived of their fees if they were not entitled to them?

Mr. Blaikie: No objection.

A. I beg pardon, Mr. Parsons, I have not implicated the Surrogate's Court or the Court of Appeals as having had any part in this bunco game. I have only so stigmatized Mr. Ritch and Mr. Vaughan as the bunco men, which, I believe, if it had been only a moderate sum involved would have been regarded by any court, and as

accessory after the fact, you, withholding the memoranda on which O. A. was minuted by Mr. Vaughan, became liable, among other things, to the parties to whom the legal right to this estate, the second half of it, belonged. There is nothing malicious, they simply feel that there is something wrong, that somebody has swindled them out of their money, and I cannot think of anybody who would be so likely to be the parties who did it as, first, Mr. Vaughan, well you might say first, Mr. Ritch, second, Mr. Vaughan, and third, Mr. Parsons, and fourthly, Prescott Hall Butler.

359

690 RD-Q. Didn't Mr. Choate have something to do with it?

Mr. Bovee: Now, Mr. Parsons, I want to move to strike this out as scandalous and not responsive.

A. I do not implicate Mr. Choate any further than I should be glad to see the checks that have been paid to him and his firm on account of defending Mr. Butler in not showing what was in that codicil, from first to last.

691 RD-Q. Have you now completed your statement?

A. I think I have answered your question pretty fully.

360

692 RD-Q. What was the question?

Mr. Blaikie: You mean as to that last heading?

The Witness: Yes, as to that last heading.

693 RD-Q. What was the question?

Mr. Blaikie: Let the stenographer read it.

Mr. Parsons: No, no, I no not want the stenographer to read it. I want him to tell me.

A. Well, it had among other things the question of implicating the Judges of the Supreme Court in this bunco game, evidently asked of me to get an expression on my part implicating them in this fraud; I do not think they were, I think they have been honest all the way through; they have been misled; they did not know what our rights were until they got to the Court of Appeals, and then, as Judge Lacombe says, through refined technicalities of the law they were led to decide this case against us which they would not have done otherwise.

361

Mr. Parsons: Now that you have shown by your answer that you have not been making an answer to the question which I put I will repeat the question which I put and move to strike out all the statement which you have made since that question was put; and to prevent any misunderstanding about it I ask the stenographer to read it from his minutes.

Question No. 689 repeated by stenographer.

The Witness: Of course in the Surrogate's Court I had nothing to do with it; I had nothing to
362 do with it, I was not connected withit; and it was there where the evil root was planted, where the information was concealed which would have shown, as I regard it, who the owners of that residuary estate to the extent of one-half were, and if it had been shown there would have been no further contest and Mr. Parsons and Arnoux, Ritch & Woodford's office would have been deprived of these perhaps hundreds of thousands of dollars in fees, and the widow and nieces would have had their just deserts.

694 RD-Q. How many hundreds of thousands of dollars does your "perhaps" stand for?

Mr. Blaikie: No objection.

A. Well, I think upwards of two hundred thousand dollars and if it was less than five hundred thousand dollars I should be a little surprised.

695 RD-Q. It is a matter of record, is it not? A. No, I have searched for that, but I cannot find the latter part of it. There have been four or five years that I have not seen any record covering that part.

696 RD-Q. So that you are testifying to these enormous figures without any knowledge upon
363 the subject and without even information?

Mr. Blaikie: Answer it.

A. No, not without knowledge, but without all information.

697 RD-Q. What knowledge have you? A. Well, the payments that have been made before the settlement of the executors' account in the Surrogate's office, that is all the absolute knowledge I have. Judging from that I concluded that Mr. Parsons in his mature years and greater experience has not been less avaricious or appreciative of his own efforts.

698 RD-Q. And is this the only justification that you have for these slanderous statements you have made?

364

Mr. Blaikie: Objected to. Do not answer the question. There is no evidence that there have been any slanderous statements yet. I object to it as incompetent, irrelevant and immaterial.

Mr. Parsons: Either answer or decline to answer.

Mr. Blaikie: I instruct the witness to decline to answer, as there is no foundation laid for it.

The Witness: I decline to answer.

699 RD-Q. Do you decline to answer on the ground

that your answer will tend to degrade you in public opinion or convict you of a crime?

Mr. Blaikie: Do not answer it. Objected to as incompetent, irrelevant and immaterial and no foundation laid for the question, and I advise you not to answer.

700 RD-Q. You and your counsel between you having prevented any answer to the last questions, I am forced to come back to the inquiry whether, during these court proceedings which you describe as a bunco game, you were represented by counsel, and if so what
365 was the name of the counsel who represented you?

Mr. Blaikie: No objection.

At the request of the witness, question No. 700 was repeated by stenographer.

A. I have always been represented by counsel in the actions to which I was a party as executor, in the first place by William Blaikie, and ex-Senator Edmunds. When Mr. Edmunds was forced by sickness in his family to leave the eastern country and unable to continue it, to attend to the duties as counsel, he saying that he could not possibly give me the personal attention which the case demanded, although expressing himself
366 with reluctance in coming to that decision and characterizing the matter in a very emphatic manner, showing to me that he really desired to continue the contest, and that it was only because of the illness of his wife or daughter or both that he retired, I then engaged or endeavored to engage Judge Dillon, and it was under consideration by Judge Dillon at the time of Jay Gould's death, if I remember right; otherwise, only for the death, I think that he would have undertaken the case, but this death threw many cares on him, and under his advice Col. James was secured. The principal part of the bunco act, that to which I have referred to you as accessory,

occurred before I had anything to do with this litiga tion-

701 RD-Q. Was Col. James the last counsel whom you employed? A. No, after the decision of the Court of Appeals I employed Roger M. Sherman. I think that is the history of my counsel.

702 RD-Q. Didn't Mr. Blaikie represent you on the Dayton reference and on the Scott Lord reference? A. He has been in the case from the start, since I was.

367

703 RD-Q. As counsel? A. Yes, as attorney and counsel.

704 RD-Q. Were you dissatisfied with Mr. Blaikie's attempt to prevent the Court being deceived?

Mr. Blaikie: Answer it.

At the request of the witness, question No. 704 repeated by stenographer.

A. I have been abundantly satisfied that his efforts were everything that I could have asked of him, but he has not been able to meet the concealed evidence which was brought out on the trial before Judge Truax.

368 He brought it out in the matter of deciding the expenses or accounts before Dayton. That was the first knowledge I had of that part of it, as to who was accountable for it; that it was not produced, I was aware of, in the Surrogate's Court, but that Mr. Parsons held it I did not know, and when he said that he would have produced it if it had been called for, I at first felt like censuring Mr Coudert, but on looking over the record I found that Mr. Coudert did call for it and Mr. Parsons still withheld it, and then I felt that Mr. Parsons had become accessory after the fact in the bunco game.

705 RD-Q Is what you describe as concealed evidence

Mr. Vaughan's memorandum about other institutions for benefit?

Mr. Blaikie: No objection.

A. That is one. I have always felt that as Mr. Vaughan's counsel, you ought to know, or Mr. Parsons ought to know, the contents of that burned codicil, and from the great reluctance to having it made known while the parties on the side of Mr. Fayerweather's family have expressed their probable willingness
369 to accept the terms provided for them in it, there must be some serious reason why, although the counsel of Mr. Vaughan and Mr. Bulkley and of Mr. Ritch had everything in their power done to prevent its being made known.

706 RD-Q. So far as concerns the memorandum about other institutions for benefit, did not the record of the probate trial inform you that Mr. Vaughan testified to the conversation on that trial and months before the settlement?

At the request of the witness, Question No. 706 repeated by stenographer.

Mr. Blaikie: What conversation do you mean, Mr. Parsons?

370

Mr. Parsons: I mean the other institutions for benefit.

Mr. Blaikie: The morning talk of the dying day, or the afternoon, which?

Mr. Parsons: Now, Mr. Blaikie, my question is complete. You will scarcely consider this sort of interruption and tutoring of a witness as admissable.

Mr. Blaikie: I think your question is misleading and ought to be corrected.

Mr. Parsons: Then you can correct it later on that ground.

The Witness: I will try and be fair with you, Mr. Parsons.

Mr. Parsons: We have had ample evidence of your ideas of fairness. Now, will you be kind enough to answer my question?

The Witness what is the question?

Question No. 706 repeated by stenographer.

Mr. Blaikie: Answer it.

371

A. Mr. Vaughan testified in the Surrogate's trial not months, and, I think, not many days, before the settlement.

707 RD-Q. Didn't Mr. Vaughan also testify to the contents of the destroyed codicil? A. I want to correct that—before the agreement to settle was made, before the agreement for the settlement was made.

708 RD-Q. Did not Mr. Vaughan also testify to the contents of the destroyed codicil, I mean on the probate trial? A. He did, so far as his counsel appeared to want him to, to establish absolute ownership. He could not seem to remember anything else.

372

709 RD-Q. Are you willing under oath to stand upon the last answer which you have given? A. That is the best impression which I can get from reading the testimony and knowing of the facts, so far as my knowledge has been furnished since, or information.

710 RD-Q. Now, let us see if this was not what occurred, that it was not Mr. Parsons but Mr. Coudert who interrogated Mr. Vaughan as to the missing codicil, and did not Mr. Coudert, upon the probate record, put to Mr Vaughan upon that subject such questions as he cared to asked, and did not Mr. Vaughan make direct answers?

Mr. Blaikie: Objected to as incompetent, irrevelant and immaterial, and not the best evidence; the record is the best evidence of what Mr. Vaughan said on that subject.

A. I think both Mr. Coudert and Mr. Parsons questioned Mr. Vaughan.

711 RD-Q. Is that the best answer that you can make to the question?

Mr. Blaikie: Same objection.

373

The Witness: What is the question?

Question No. 710 repeated by stenographer.

712 RD-Q. Is that the best answer that you can make? A. No; I think Mr. Vaughan did not testify as fully as he could and ought to. Full and correct answers to Mr. Coudert's questions would have defeated his efforts to obtain and his obtaining the probate of the dying day codicil because the——

713 RD-Q. You have testified as a justification for what you have said about Mr. Parsons that you think he must have seen the destroyed codicil and that
374 he withheld information about it which it communicated to him. Do you not know that that codicil was destroyed on the 15th of November, 1890?

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial.

A. No, I do not believe that it is destroyed now; I do not know it, but I do not believe that it is destroyed now.

714 RD-Q. Do you not remember that upon the Surrogate's trial Mr. Vaughan testified that it was destroyed by your wife, then Miss Amelia Joyce? A. Yes, and that he knew that she could not have known what was in an envelope which he handed her also. I do not think he intended that she should know it, and I do not think he destroyed it, and I fully believe that it is in existence to-day, both in Mr. Vaughan's possession, and in some way it is a matter fully known to the office of Evarts, Choate & Beaman, and if that could be
375 read, this case would be decided right on the spot here, no more controversy over it, and that would be Mr. Fayerweather's will.

715 RD-Q. Do you mean to say that that would be a defense to the damage suits? A. I believe that if that thing was brought out, Mr. Parsons, and you did what I fully believe your duty to do, to show Mr. Fayerweather's honest purpose in this thing, that there is not a person representing his widow or nieces but what would be, as Doctor Vedder says he directed they should be, fully satisfied, and then the rest should go to the colleges. I understand Mr. Fayerweather's will to be that they must be satisfied and fully paid before the colleges got one cent, either in specific legacy or in the residuary legacy.

376

716 RD-Q. Then the object of the suits brought against the executors to which their counsel were joined as parties defendant was, was it, to try and get for you as Mrs. Fayerweather's executor and the nieces what you supposed to have been given to them by the destroyed codicil?

Mr. Blaikie: One moment. Objected to as incompetent, irrelevant and immaterial, and no foundation laid for it, and I instruct the witness not to answer the question as a breach of his duty.

The Witness: Under advice of counsel I decline to answer.

717 RD-Q. Do you consider that there is any justification for commencing a suit of that character, and procuring the statements of an unsworn complaint to be published in the newspapers involving the names of the executors and their counsel, for such a purpose as that which you have now avowod.

377

Mr. Blaikie: One moment. Same objection and no proof of anything such as you have stated, and no proof that anything of the kind was given to the newspapers, and I advise him not to answer.

The Witness: Under advice of counsel I decline to answer.

718 RD-Q. Do you decline to answer because your answer will convict you of perjury?

Mr. Blaikie: Same objections and same instructions. They cannot trap you in that way.

719 RD Q. Or tend to degrade you?

378

Mr. Blaikie: Same objections and same instructions.

720 RD-Q. Or convict you of crime?

Mr. Blaikie: Same objections and same instructions to the witness to decline to answer each question.

721 RD-Q. Do you answer or do you decline to answer? A. I wish to say that I am not in the slightest degree disturbed by your apparent intimidation or effort to intimidate; that I am yet to become aware of any successful issue of a case brought by parties who have

obtained money in what seems to me is the most stupendous bunco game that was ever played in the City of New York for damages in trying to obtain their rights from them after their goods have been stolen or obtained by a breach of confidence.

722 RD-Q. Well, have you not just said that if the parties concerned received what was given to them by the codicil referred to, they would be satisfied, and that would end all litigation?

379

Mr, Blaikie: Same instruction to decline to answer and the same objections.

The Witness: I decline to answer.

723 RD-Q. Assuming that anything was given to Mrs. Fayerweather or the nieces or anybody else by that codicil and that it was received by the parties interested, would any part of it come from Judge Arnoux or Mr. Parsons?

Mr. Blaikie: Same objections and same instructions.

The Witness: And the same answer on my part.

Mr. Blaikie: The same declining?

380

The Witness: The same declining.

724 RD-Q. Have you now in the course of your examination stated the limit of any reason or justification for the damage suits brought in the name of Miss Emma S. Fayerweather and Mrs. Achter?

Mr. Blaikie: Same instructions and same objections.

The Witness: The same answer.

725 RD-Q. Do you not know that it was claimed by the defendants in that suit that it was brought mali-

ciously, prosecuted maliciously, and that the object was to try and coerce some concession, and that such claim was brought to your notice?

Mr. Blaikie: Same objections, and also that the paper referred to by the counsel is the best evidence and the witness' statement is not; and the same instruction.

The Witness: I give the same answer; I decline to answer under advice of counsel.

381

726 RD-Q. Did you ever inform Miss Emma S. Fayerweather or Mrs. Achter of the position in which they were placed by having their names used in suits claimed to be maliciously brought and maliciously prosecuted?

Mr. Blaikie: Same objections and same instructions.

The Witness: Under advice of counsel I refuse to answer.

727 RD Q. Do you know anything about letters written to those ladies upon that subject, the character of the suits brought in their names l

Mr. Blaikie: Same objections and same instructions.

382

The Witness; Under advice of counsel I decline to answer.

728 RD-Q. Do you know whether they received those letters?

Mr. Blaikie: Same objections and same instructions.

The Witness: Under advice of counsel I decline to answer.

729 RD-Q. Have you their authority for the statement which you have recently made that if they can re-

ceive anything, if anything, which was given to them by the Butler codicil, they are satisfied, and that so far as they are concerned the litigation ends ?

Mr. Blaikie : Same objections and same instructions.

The Witness : I have not said any such thing.

730 RD-Q. Have you their authority for the statement that you did make upon the subject, whatever the record shows it to have been ?

383

Mr. Blaikie : Same objections and same instructions.

The Witness : Under advice of counsel I decline to answer.

731 RD-Q. When did you first get in communication with Miss Emma S. Fayerweather and Mrs. Achter with reference to any claims which they might have against the Fayerweather estate ?

Mr. Blaikie : The same objections and the same instructions.

The Witness : Under advice of counsel I decline to answer.

384

732 RD-Q. Is it not the fact that having been authorized by them to represent them in their claims against Mr. Fayerweather's estate, you subsequently made an effort to bring about a settlement in which you threw them overboard altogether, and said that if provision could be made for you as Mrs. Fayerweather's executor and for Mrs. Reynolds, it would be a complete settlement of everything ?

Mr. Blaikie : Same objections and same instruction.

The Witness: Under advice of counsel I decline to answer.

733 RD-Q. Did you ever tell either of those ladies that you undertook to bring about a settlement and to obtain money for yourself as executor, which meant for Mrs. Reynolds and for Mrs. Reynolds, and that that being received you would let them go?

Mr. Blaikie: Same objections and same instructions.

385

The Witness: Under advice of counsel I refuse to answer.

734 RD-Q. When was it that you last had a conversation with Judge Beardsley?

Mr. Blaikie: Objected to, there having been no ground laid for the question, and as incompetent, irrelevant and immaterial.

A. Friday or Saturday last.

735 RD-Q. In New York? A. Yes, sir.

736 RD-Q. When prior to that time?

Mr. Blaikie: Same objections.

386

A. Well, I do not recall. Mr. and Mrs. Beardsley are frequently at our house and spend the night there quite frequently.

737 RD-Q. Did he spend a night there last week?

Mr. Blaikie: Same objections.

A. No. His wife and daughter did, however.

738 RD-Q. Did you learn that he attended in the Supreme Court last week to be examined as a witness

in the Plant case, which is on trial, in which Mr. Parsons is engaged as counsel on one side?

Mr. Blaikie: No objection.

A. Here in New York?
739 RD-Q. Here in New York.

At the request of the witness Question No. 738 was repeated by the stenographer.

387

A. He mentioned being here on legal matters, and I do not think I inquired as to what case it was. I do not think he mentioned the fact that he was or was not connected with the Plant case.

Adjourned to January 29, 1901, at 10.30 A. M.

NEW YORK, January 29, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. BOVEE, Mr. MCLOUGHLIN, Mr. FAIN, Mr. CARNOCHAN, a
388 representative of Root, Howard, Winthrop & Stimson, a representative of Russell & Holmes, and a representative of Nash & Jones.

Mr. Bovee: Mr. Sherman, what is your desire this morning?

Mr. Sherman: Is Mr. Parsons to be here?

Mr. Bovee: I think he has concluded the examination of Mr. Reynolds.

Mr. Sherman: No such announcement was made, was there?

Mr. Bovee: Do you want to re-examine him?

Mr. Sherman: The testimony is not all here and I cannot conclude with him until I get it. Was there any announcement at the close yesterday that Mr. Reynolds' examination was closed?

Mr. Bovee: No.

Mr. Sherman: When it gets on the record I will deal with it.

Mr. Bovee: Defendants state that they have concluded the examination of Mr. Reynolds.

389

At this point Mr. Parsons appears.

Mr. Parsons: I understand you want me to be examined.

Mr. Sherman: I have said that when I got through with Mr. Reynolds I would go on with you. I did not intend to give you the inconvenience of coming here until the recross-examination of Mr. Reynolds should advance as far as I can go with it to-day.

Mr. Parsons: We shall probably have further examination of Mr. Reynolds when you get through.

Mr. Sherman: I do not propose to cross-examine him until you get through. Mr. Bovee stated on the record that you were through.

390

Mr. Parsons: I will ask Mr. Reynolds a few further questions now.

Continuation of the REDIRECT EXAMINATION of JOHN B. REYNOLDS:

By Mr. Parsons:

740 RD-Q. Are you aware that upon your examination by your own counsel you stated in answer to question 371, among other things, that at the time you

brought your action and advised, so far as you did advise, the bringing of other actions, you did not have in mind that the residuary clause in the first codicil to Mr. Fayerweather's will, as reaffirmed and amended by the dying day codicil, was an absolute devise not subject to any trust or any qualification?

Mr. Sherman: Objected to on the ground that the exact converse of the proposition appears from the record referred to to have been the testimony of the witness.

391

At the request of counsel, Question No. 740 repeated by stenographer.

741 RD-Q. Are you not aware that upon your examination by your own counsel you stated in answer to question 371, among other things, that at the time you brought your action and advised, so far as you did advise, the bringing of other actions, you did have in mind that the residuary clause in the first codicil to Mr. Fayerweather's will, as reaffirmed and amended by the dying day codicil, was an absolute devise not subject to any trust or any qualification? Are you aware that you testified to that? A. In the first place I do not
392 understand that the question is correct in making it my direct examination by my counsel. I understand that I am Mr. Parsons' witness, and he cross examined me. Is that correct? If I understand the meaning of your question, I could not make the answer more correct thanit was in the record.

742 RD-Q. Did Mr. Parsons examine you upon any such object? A. Mr. Sherman was cross-examining me upon your direct examination, as I understand it.

743 RD-Q. Did Mr. Parsons examine you upon any such subject? A. Well, I think on pretty much

everthing you could think of, Mr. Parsons, I suppose so.

744 RD-Q. Do you not remember that so far as I called you as a witness your examination was very limited?

Mr. Sherman: I object to that on the ground that the record made by counsel for the defendants cannot be qualified or changed by the recollection or inferences of this witness as to its import or tendency.

393

A. I do not know what you have in mind as to being limited, it has been all day yesterday and going on with the direct-examination to-day or the redirect.

745 RD-Q. Do you wish to state under oath that Mr. Sherman's examination of you was in the nature of a cross-examination? A. That is the way I understand it.

746 RD-Q. Who gave you that understanding? A. I understand that you subpœnaed me and made my direct-examination and rested, and Mr. Sherman took up the cross, and then you began yesterday
394 morning or the day previous on the re-direct, and you are continuing with redirect. That is the way I understand it. I may be in error.

747 RD-Q. Does that understanding influence in any way your testimony? A. Well, I cannot say that I should testify any different if the error had been left in the record.

748 RD-Q. Come now to the question that was put to you, and answer whether you are aware that in answer to question 371 by your own counsel you testified that at the time you brought your action and advised, so far as you did advise, the bringing of other actions, you had in mind among other things that the

residuary clause of the first codicil to Mr. Fayerweather's will, as reaffirmed and amended by the dying day codicil, was an absolute devise not subject to any trust or any qualification? A. And what was my answer?

749 RD-Q. I ask you whether you are aware you gave that testimony? A. I remember the question but I do not the remember the answer.

750 RD-Q. Can't you remember whether you answered it yes or no? A. No.

395

751 RD-Q. Is it a matter of indifference to you whether you answered yes or no? A. No, but I think I am entitled to know what my answer was. If I am not I ought to be informed.

752 RD-Q. I will inform you. Your answer was yes. A. Well, then I think it was proper and believe it to be true now. It claimed to be absolute; I was aware of that.

753 RD-Q. How long did you continue to have that in mind? A. I do not know that I ever expressed any conversion up to date.

754 RD-Q. Do you remember that yesterday afternoon in answer to Question 564 put to you by Mr.
396 Parsons you testified, among other things, that before the commencement of the five colleges suit you showed the attorneys, or some of them, on behalf of the colleges the evidence which would establish the trust and destroythe deed of gift.

At the request of the witness Question No. 754 was repeated by stenographer.

A. I might modify that by saying that I told them of evidence which would tend to that result and believed that it would, and that I found myself in error when Judge Truax overruled me.

755 RD-Q. The question is whether you remember that yesterday afternoon you gave that testimony.

Mr. Sherman: Objected to as immaterial.

A. I think I testified as you read.

756 RD-Q. Are you willing to stand upon this record as stating under oath that you went to the attorneys for colleges and showed them evidence which would establish the trust, and that at the same time you had in mind that the residuary clause in Mr. Fayer-
397 weather's will, as reaffirmed and amended by what you call the dying day codicil, was an absolute devise not subject to a trust?

Mr. Sherman: Objected to on the ground that the proposition what this witness stands upon in this record is one to be determined through the medium of his counsel, and that the question is wholly improper, and unwarranted, and I advise the witness to decline to answer it.

The Witness: Under advice of counsel I decline to answer it.

757 RD-Q. Must not one or the other of those statements be absolutely untrue? A. I do not see the least conflict in them as far as I can understand them,
398 with a slight modification which will bring it within your capacity to understand it, which I have just made.

758 RD-Q. That is to say, you see no inconsistency between your having in mind that there was no trust, and going to the representatives of the colleges and telling them that there was a trust or that you had evidence which would show that there was a trust? A. I did not testify to having done any such thing yesterday, I testified just the contrary, that they came to me and I showed them certain evidence which, as I have modified it, would tend as I believe to establish a trust; but I found when Judge Truax decided that there was no

trust that I was mistaken, and again when the General Term decided that there was, I was right. That is the first time I knew I was right in it.

759 RD-Q. Did you on the occasion testified to by you in answer to question 564 show to the attorneys or some of them on behalf of the colleges evidence which would establish a trust? A. I cannot say that I showed them evidence; I told them that Mrs. Reynolds could testify that she read that letter which is contained in the envelope marked O A, which is very familiar to
399 Mr. Parsons; that she read that letter to Mr. Fayerweather, and that Mr. Vanghan in the Surrogate's Court had denied Mr. Fayerweather having read it, as I remember it, he also denied the same thing in the five-college action, and that he refused to have it read to him. Mrs. Reynolds was able to say that she read it to Mr. Fayerweather on the evening of Friday, the night before he died. That statement I did make to one or more of the colleges' representatives or attorneys who came to see me upon it.

760 RD-Q. Did you on the occasion referred to when you had this conversation with the attorneys for colleges, have in mind, as in answer 371 you testified that you did have in mind, that the will, as reaffirmed and amended by the dying day codicil, was an absolute devise not subject to any trust or any qualification?

400

At the request of the witness, question No. 760 was repeated by stenographer.

Mr. Sherman: Objected to on the ground that the statement of the question cited by counsel for defendants is misleading and untrue, inasmuch as the question relates to the time of the commencement by this witness of actions, and not to the time when he disclosed the matters in question to counsel for the colleges.

Mr. Parsons: We object to the statement of counsel, and we call attention to the fact that the testimony of this witness is that this conversation with attorneys for colleges was before the commencement of the five-colleges suit, and I repeat the question.

Mr. Sherman: Counsel for the complainants points out upon the record the fact that the counsel for the defendants is deliberately attempting to mislead the witness by stating untruthfully the questions which he undertakes to quote to the witness, and he insists
401 that it is within his right to correct any such improper conduct by counsel upon the record.

Mr. Parsons: Answer, please.

A. If I testified yesterday that it was before, I would qualify it, at about the time of bringing the suit; it might have been after the suit was begun. I know I furnished them with evidence and they made very valuable use of it.

761 RD-Q. Did you at that time have in mind what in answer to Question 371 you stated that you had in mind, that the residuary clause, as re-affirmed and amended, was an absolute devise, not subject to any trust or qualification?

402

At the request of the witness, Question No. 761 repeated by stenographer.

A. I think I fully answered that question, and I think it is the same that has been asked me about three times over.

762 RD-Q. Will you be kind enough to say directly whether you did or did not have that in mind? A. I cannot express it any better than I have before, and if Mr. Bonynge will read the previous answer to it I will repeat it.

763 RD-Q. Do you decline to make any other answer? A. I will make the same answer that I did before without the slightest variation in it, and no other.

764 RD-Q. Do you decline to say in direct terms whether you did or did not at that time have in mind what you testified that you did have in mind? A. I decline to make any different answer than I have already made, unless advised by my counsel that I must, or the Court. I am perfectly willing to repeat it as often as Mr. Parsons wants me to.

403

765 RD-Q. I want you to answer if you are willing to answer it once directly. I want to give you the opportunity if you desire of making any correction to the testimony which you gave in answer to the Question 371, put to you by your own lawyer. If you do not desire to avail of the opportunity, I am satisfied with the record as it stands.

Mr Sherman: Objected to on the ground that the intimation in the last statement of counsel for the defendants that the witness has not thus far answered the question correctly is a gross and insolent abuse of the power of counsel.

404

The Witness: I repeat the same answer that I have heretofore given.

766 RD-Q. To whom, in the testimony to which your attention has just been directed, did you refer, as the attorneys of colleges, to what individuals? A. I referred first to Martin W. Cooke of Rochester, and Putney & Bishop later, I think later, and Elihu Root.

767 RD-Q. To which member of the firm of Putney & Bishop? A. I do not now remember; I think they were both present.

768 RD-Q. Who were the individuals referred to by you, in answer to question 646 put to you yesterday afternoon, as representatives of the colleges, who offered a fee of ten thousand dollars, &c. ? A. Colonel James came to me——

769 RD-Q. I simply want to know who were the individuals to whom you refer. A. Well, I shall have to give you a little explanation in order to get them in, probably.

405

770 RD-Q. Will you mention their names ? A. I will, if you give me a chance.

771 RD-Q. Do you want a chance to get in something else besides their names? A. No, I want to get a chance to make it so that the Supreme Court will know what I am talking about, not only Mr. Parsons.

772 RD-Q. Your testimony is that Col. James was offered, by the representatives of the colleges, a fee, &c. I want to know who were the individuals, to whom you referred as representatives of the colleges; I want their names. A. Yes. Now, Col. James came to No. 11 East Fifty-seventh street, after the decision of the Court of Appeals and before I had eaten my dinner,

406 and said he had got to go to the Court of Appeals, at 12 o' clock, that he had a proposition submitted to him by the attorneys of the colleges, and it was brought—I would not say that it was brought to him alone by Martin Cooke, but his name was mentioned because he had an appointment with Martin W. Cooke, at the Waldorf-Astoria, after the theatres were over; he was there with his wife and daughter, and two Judges from the western part of the State, and they went out to the theatre, and he wanted an immediate answer, he advised me to accept of it. I said: "Colonel, it is a little hasty and you have got to meet them after the

theatre to receive my answer, and I guess I will meet with you" ; and we arranged to do so, and I went down and stayed there until about 11 o'clock, and Mr. Cooke came in before Colonel James and we had quite a long chat before Colonel James came in, and these two Judges came through the hall and Mr. Cooke very politely introduced me to them, and one of them suggested, I guess Mr. Cooke suggested that we have a little lunch or night-cap before we went to bed, the result of which was that we went into—or started to
407 go into the café and we met Col. James in the hall. We went in and sat down at a table, and Col. James gave the order for lunch, and he ordered a very fine lunch, a part of which was a quart bottle of champagne, which if I remember right was repeated before we got through ; the Judges, one of them, did not drink champagne, and they had another bottle of wine, and I took very little of the luxuries of the table. They had some very nice sandwiches which I recall and can relish now. And then after that was over very little time was given for negotiation, and I said at once, because the Colonel had got to get his train, I suppose perhaps they thought I was all ready for a bargain at that time, and I said I could not decide the matter that night, that I
408 would defer the matter until after Colonel James returned from Albany. Mr. Cooke I think remained over here a day or two on that account. At any rate, after his return from Albany we met at Colonel James' office.

773 RD-Q. Who met? A. Mr. Cooke as representing the colleges, and he certainly told me that he had had conferences with the representatives of the colleges, and I supposed that meant the representatives of the five colleges because the other colleges had been very inactive in the suit and it was hardly thought necessary to go beyond that; but Mr. Cooke said, I think, that Mr. Hornblower, representing his college, was very

reluctant to make any contribution even to that extent, and it was all they would do, all he thought it was possible to get them to do. Now whether he told the matter truthfully or not of course I am unable to say, but I believe he did.

774 RD-Q. Is what you have now testified to the basis for the answer which yesterday afternoon you gave to question 646 in which you spoke about an offer of $10,000, &c.?

409

At the request of the witness Question No. 774 was repeated by the stenographer.

A. I do not know as it is the base of it, it is a part of it, it is a part of the structure.

775 RD-Q. Is there any other part? A. Oh, there is more conversation than I have repeated, of course; I cannot give the full detail of it.

776 RD-Q. Have you stated all that you remember? A. Well, if the stenographer will read all that I have stated I can then refresh my memory; I do not think I have.

777 RD-Q. If you can remember anything additional, state it. A. I do not think of anything that I want to put on the record. Yes, I will add
410 something to it. After it was over, that I said to Colonel James that I was going to follow this thing through as long as I lived, but what it should have a right termination; that I recognized his efforts, and it was with great reluctance that I came to that decision, and that if I won I would make him as well compensated as he would be to accept that proposition, and I wanted to have the matter perfectly pleasant as between him and me, so that we should be the warm friends that we had been, and that I had the privilege, if I desired to, to come to him for occasional advice or assistance, and that is my understanding of our present arrangment, present relations.

778 RD-Q. When you testified yesterday, you stated that Colonel James advised the acceptance of this proposition; did he do so, or did he not do so? A. He did do so.

779 RD-Q. The proposition, according to your testimony of yesterday, embraced giving you a moderate consideration. What was that?

Mr. Sherman: Wait a minute——

A. I dislike very much to embarrass the colleges by stating it, Mr. Parsons; I hope you will excuse
411 it for their sake. Do you wish me to answer it?

780 RD-Q. When I put a question to you, of course I wish you to answer it.

The Witness: Read the question, please.

Question No. 778 repeated by stenographer.

A. They proposed to give me a consideration of five thousand dollars, and my reply was, "If you propose as colleges receiving the bounty of Mr. Fayerweather to give the executor of his widow, after being to a very great expense and furnishing you so largely with the material with which to win this residuary estate you propose to give Mrs. Reynolds an additional annuity of two thousand dollars a year, she has got to live five
412 years to get as much as you propose to give to my attorneys each, ten years to receive as much as you propose to pay cash down to my attorneys, and it looks like a bribe to me on the part of these colleges to do it, and I shall not assent to anything of the kind."

781 RD-Q. How long after Colonel James advised your acceptance of that proposition did he continue to be your counsel? A. Well, in those relations which he had then he has now, and I regard him as a good warm friend and one that I feel at perfect liberty to go and counsel with and talk freely in regard to this case, and I have done so so far as I found it was profitable or

agreeable, I did not want to bore him with it; he always asks me how I am getting along.

782 RD-Q. Has he ever acted for you in any matter involving the Fayerweather litigation since then? A. Not in court. I think that something further that I said there perhaps would be a comfort to you, Mr. Parsons, if you will allow me to add to my answer. Strike that out, it may come in later. In continuation of my answer, if there is anything further, I would state that

413 I remarked to Mr. Cooke on this occasion in Col. James' office that if there was any reason why these colleges should feel themselves obligated to do anything different from what the Court of Appeals had said in their decision, the same reason was sufficient for them to do a decent thing by Mrs. Reynolds or Mrs. Fayerweather's executor and the nieces.

783 RD-Q. Was that the last of it? A. No, I think there were some letters written after that. The last conversation that I recall was with Mr. Cooke and Colonel James.

784. RD-Q. Was what subsequently transpired an effort on your part to have the colleges do what you call a decent thing? A. Well, it is possibly so.

785. RD-Q. Did they ever do what you call a

414 decent thing. A. No, I have not known of their doing a decent thing in connection with the case since the Court of Appeals decision, you might say since the Truax decision.

786 RD-Q. Is that what you referred to on your examination yesterday afternoon as piggishness or hoggishness or some expression of that kind? A. No, not entirely.

787 RD-Q. Is it in part? A. I thought when I had been so useful to them in securing the half of the estate, and while they said to me on more than one occasion, and I think more than one attorney who represented these colleges, that at the first they had no expectation of getting more than one-half of the estate, that under all

those circumstances they ought to be righteous enough, I cannot call it generous because it would not be a generous act, they ought to be righteous enough to do something near what they must know would be Mr. Fayerweather's wishes in regard to his family.

788 RD-Q. Was the omission or refusal to do what you referred to—what you referred to as their piggishness or hoggishness? A. No, the idea or suggestion of buying my attorneys for ten thousand dollars apiece looked like a piggish thing for them to do; why
415 didn't they add as much as Mr. Parsons got, $30,000 and $50,000, to Arnoux, Ritch & Woodford—I think if they were going to buy them they ought to have given a fair price for it, they ought to have given them $50,000 apiece; they had certainly done more work than Mr. Parsons' or Mr. Ritch's office did in the Surrogate's trial, and they had $80,000 between them for their services in the Surrogate's trial, Mr. Parsons having $30,000 and Mr. Ritch's office having $50,000, and to pay my attorneys $10,000 was an insult to them and an insult to me as executor of Mrs. Fayerweather's estate.

789 RD-Q. Are you aware that you were represented before Scott Lord upon the accounting of the executors, which accounting embraced the payment by the
416 executors to Mr. Parsons of the $30,000 referred to, and that you not only did not except to the payment, but that your counsel stated that so far as that amount was concerned he considered it reasonable?

Mr. Sherman: Wait a minute.

The Witness: I want to answer that.

Mr. Sherman: Well, I want to put an objection on the record if you do answer it. Objected to as evidence at large in the cause, as overruling the plea, as not being redirect-examination upon any subject introduced upon cross-examination, as argumentative, hypothetical and incompetent, irrelevant and immaterial.

Mr. Parsons : We will not press it against objection. I will ask another question.

790 RD-Q. In a recent answer you spoke about other attorneys. I understood you to mean attorneys other than Mr. Cooke, as representing the colleges, with whom you had conversation in your effort to have them do what you call a decent thing. Who are those other attorneys ? A. I can only say that in the course of the conversation Mr. Cooke said that he had had conferences with Mr. Root, Putney & Bishop, and I
417 think he mentioned some of the others. I thought quite a number, but I do not know whether he ever did see one of them or not, Mr. Parsons ; I believe that he did.

791 RD-Q. My object is to ascertain who participated in this conduct which you call piggish. Have you now stated all the names that you can remember ? A. Mr. Cooke gave me the impression, and I think Colonel James the same, that there was a pretty general meeting of the attorneys ; they wanted to see an end to this thing, and they felt that it was better to make this proposition, this concession, than to take the chances of further litigation, and I supposed from his statement of it that it was a pretty general meeting of the attorneys for the twenty colleges.

418

Mr. Parsons : That is all.

RECROSS-EXAMINATION by Mr. Sherman :

792 R-x-Q. Mr. Reynolds, in your examination to which you have been called by Mr. Parsons, on this examination have you been compelled to listen to observations made by Mr. Parsons in your hearing, but not placed upon the record, of a reproachful and insulting character ?

Mr. Parsons: I object to the question as leading, and submit that if the witness is to make any statement of the kind he is to be asked what he has heard said by Mr. Parsons of any such character.

A. I think I have on several occasions listened to such remarks when he directed the stenographer not to take this down, several occasions.

793 R-x-Q. Did you hear Mr. Parsons, while he was talking about what he terms an extraordinary
419 action brought upon a complaint not verified, say in substance that it was an attempt at blackmail?

Mr. Parsons: We object to the question as leading. If any inquiry is to be made of the witness upon such subject the question should be what he heard Mr. Parsons say, so that if he is willing to swear that he heard any expression of that kind used it may appear upon the record with the opportunity of showing what the truth is.

Mr. Sherman: Now answer.

794 R-x-Q. During the first two or three days or upon one of the early days of your examination, did you hear Mr. Parsons request somebody to bring to him what he described as some charge of a Judge
420 recently given upon the subject of blackmail, observing in substance that the rules there laid down had a close application to this case? A. I remember something of the kind; I do not remember it having been read.

Mr. Sherman: I do not think you apprehend the precise purport of the question. I will repeat it.

Mr. Parsons: We object to the repetition of the question; the witness has answered it, and it is immaterial if counsel is not satisfied with the answer.

Mr. Sherman: Read it, please.

Question No. 794 repeated by stenographer.

A. Yes, sir; I do recall it.

795 R-x-Q. Did Mr. Parsons in that connection appear to be flourishing some paper which was brought him, and to be perusing parts of it with apparent satisfaction to himself?

Mr. Parsons: Objected to upon the ground that it is wholly immaterial and irrelevant, and that if the witness is to testify that Mr. Parsons had any such paper, or sent for any such paper, he is to make a statement in his own language so that he may be amenable to direct contradiction.

421

A. Well, the whole examination has been pregnant with suggestions and remarks which it seemed to me to be intended to intimidate me for fear of damages or a suit for damages, as being liable under a charge of blackmail or other complaint. I got that impression from very many remarks that have been made during the examination, and I think I told Mr. Parsons yesterday that it had not the slightest effect as far as intimidation goes upon me; that I was prepared to verify the pleading that was referred to if it was not verified, and take any other steps if it was necessary to show my good faith in the matter.

422

796 R-x-Q. Has the residuary estate under Mrs. Fayerweather's will, which you are as you conceive under a duty to collect, such rights as Mrs. Fayerweather was entitled to in the estate of her husband, of which he was deprived by the grievances which are set up in the cross-bill of complaint herein?

Mr. Bovee: We object to that question as incompetent and calling for the conclusion and opinion of this witness.

At the request of the witness question No. 796 repeated by the stenographer.

Mr. Bovee: Add to the objection that it is irrelevant and immaterial to the issues here.

A. Yes, sir.

797 R-x-Q. Was it in that sense that you spoke in Mr. Parsons' examination of you when you said that the residuary estate had been expensive? A. Yes, sir.

423

798 R-x-Q. Mr. Reynolds, was the suit brought by Mrs. Fayerweather originally, and revived after her death, brought at her expressed wish?

Mr. Bovee: We object to that as incompetent under Section 829 of the Code, and as calling for the conclusion or opinion of the witness.

Mr. Sherman: Does that apply to an executor?

Mr. Bovee: You have the objection.

Mr. Sherman: It is a very poor one.

At the request of the witness, question No. 798 repeated by the stenographer.

424

A. Yes, sir.

799 R-x-Q. Did the complaint as served embody what Mrs. Fayerweather designed to accomplish by the bringing of the suit in her lifetime?

Mr. Bovee: We object to that as incompetent, irrelevant and immaterial to the issue presented by the special plea, and the complaint is the best evidence of what it contains.

At the request of the witness, question No. 799 repeated by the stenographer.

A. I so understand it.

800 R-x-Q. Referring to Mr. Parsons' question 567, which is as follows:

"Are you not perfectly aware of the position that was taken by the executors and their counsel, that is, they wished to put upon the Court the responsibility of determining what should be done with Mr. Fayerweather's estate?"

425

are you aware that so far as expressed through Mr. Parsons, their counsel, the position taken by the executors was, in the language of Mr. Parsons,

"I will make one further statement in answer to the inquiry. That is this, that from the beginning of my connection with the case down to now I have advised my clients that it was right that all concerned should have the possession of all evidence, written or oral, which could bear upon the determination of any of the questions which are in issue concerning Mr. Fayerweather's estate";

426

and again,

"Whether this will could or could not be proved was for the Court to determine when all of the evidence that anybody desired bearing upon the subject should be before the Court. Much of that evidence might have been concealed, but the position which the counsel for the executors took at the start, and to which they adhered to the end, was that their relation to this controversy was of a trust

character; that it was for them to give the Court all the facts which they knew for the Court to decide; and I defy anybody to point to anything from the beginning to end of this litigation in the way of action on the part of counsel which is adverse to that view,"

and having made such professions to the counsel for Mrs. Fayerweather and for the nieces, and having brought them to the point of believing that the true attitude of these gentlemen, I mean the executors
427 and Mr. Parsons, was as professed therein, and thereby having lulled them to repose or induced them to accept such evidence as was furnished as being truly all, they, and particularly Mr. John E. Parsons, withheld from them the fact that there had been instructions for a codicil on the morning of Mr. Fayerweather's dying day which had been noted upon an envelope by Mr. Vaughan, Mr. Parsons client, which envelope is the Exhibit O A in the five college record, and that he had withheld from them any knowledge of that exhibit and that conversation, thereby procuring the probate among other things of the codicil to which O A related, and which was entirely in conflict with the instructions on Exhibit O
428 A, and being thereafter challenged for such, his conduct, he replied as follows:

"I was employed to obtain the probate of these papers offered for probate as the will and codicils of Mr. Fayerweather; Mr. Coudert was the opposing lawyer; I recognized the right of Mr. Coudert to any information in the possession of these gentlemen for which Mr. Coudert asked, but have yet to learn that if Mr. Coudert thought that evidence of which I knew would be favorable to his side of the controversy, I being on the other side, my duty to my clients required that I

should endeavor to hurt their case. I understood that my professional duty was just the reverse of that. Remember, this was the question of the probate contest,"

and again:

"I did have that paper on the chance that it might be asked for, and was ready to produce it. Q. Did you give any information to the widow and nieces, or to their counsel or either of them,
429 that there was such a paper in existence? A. I think it extremely unlikely that I should do so."

Mr. Bovee: We object to the question as incompetent and leading, incompetent in that it assumes facts which have not been proven, that if any such testimony as is incorporated in the answer has been given, the record of the proceedings is the best evidence of what was said and all that was said. We object to the matter as irrelevant and immaterial to the issue presented by the special plea; and we object to it particularly on the ground that it puts into the mouth of the witness the matter sought to be elicited.

A. Yes, sir: I heard a good portion of it from the mouth of Mr. Parsons personally.

430

801 R-x-Q. My inquiry is whether your understanding of the position taken by the executors in contrast to that assumed in the question of Mr. Parsons, namely, question 567, is or is not embodied in the question which I have just asked you as being the position taken by Mr. Parsons for the executors?

Mr. Bovee: We object to it as irrelevant. The understanding of the witness is incompetent, irrelevant and immaterial.

At the request of the witness, question No. 801 was repeated by stenographer.

A. Yes, sir.

802 R-x-Q. Did you, when you filed your cross-bill, understand that the withholding from the record on the probate contest of the version of the conversation with Mr. Fayerweather given by Mr. Vaughan in the five college action, and the withholding of the fact that instructions were given for the codicil of November 15th,

431 and that those instructions were noted upon the envelope that Mr. Parsons had, and that the codicil brought back by Mr. Vaughan in every respect disregarded and annulled the instructions and the headings upon Exhibit O A, impugned the integrity of the probate of the will and codicils, that it added to other circumstances tending to establish the invalidity of the will and codicils an additional fact which was relevant, important, and sufficient to justify the impeachment and annulment of the probate, and did you bring and file your cross bill in that conviction?

Mr. Bovee: We object to the question as incompetent, irrelevant and immaterial to the issues presented

432 by the special plea; incompetent as being leading; and that the instructions referred to in the paper are the best evidence, and the opinion of the witness is immaterial.

A. I did.

803 R-x-Q. When you have spoken of the devise to the three men under the will, the first codicil and the dying day codicil, as being an absolute one, have you referred to the papers as they appeared on their face?

Mr. Parsons: We object upon the general grounds which have been previously stated, and we particularly object upon the ground that this is an attempt to extract from the witness a point-black contradiction by himself of his own testimony, and that it ought not to be per-

mitted; that counsel for the defense gave the witness the opportunity of making any explanation or correction, if he desired, and that the result was his willingness to stand by the testimony.

At the request of the witness, question No. 803 was repeated by stenographer.

A. I have never intended to refer to them in any other light, and have been convinced by the testimony of Mr. Bulkley, Mr. Vaughan and Mr. Ritch that
433 they so understood it to be an absolute gift, while I have never believed that it was such.

804 R-x-Q. You were asked whether you noticed in the probate record that Mr. Vaughan testified to his conversation of November 15, 1890, with Mr. Fayerweather both in answer to questions put by Mr. Parsons and in answer to questions put by Mr. Coudert. Whether the questions were put by Mr. Parsons or by Mr. Coudert, did Mr. Vaughan in the Surrogate's testimony say anything about the conversation with Mr. Fayerweather in relation to more institutions for benefit having occurred in the morning of that day?

Mr. Bovee: We object to it as incompetent and on the ground that the record of the testimony given
434 by Mr. Vaughan in the Surrogate's contest is the best evidence, and that it calls for the conclusion of the witness as to what Mr. Vaughan testified to, and as irrelevant and immaterial to the issues presented here.

A. No, sir.

805 R-x-Q. Did Mr. Vaughan upon the Surrogate's contest testify, so far as the record shows, to any conversation with Mr. Fayerweather as involving more institutions for benefit, except as he testified to such conversations on the afternoon of November 15, 1890, and after the execution of the codicil dated that day?

Mr. Bovee: Same objection.

A. That is the way I understand the testimony in the Surrogate's record.

806 Re-x-Q. Mr. Parsons asked you, question 614, referring to the verification of the pleading, "Is there not one notable case in which you did not?" that is, verify your pleading. Did you understand that that question referred to an action for damages brought against John E. Parsons and others, including Ritch,
Bulkley and Vaughan, for an alleged fraudulent
435 conspiracy to obtain possession of Mr. Fayerweather's estate and convert it to their own use by various illegal and fraudulent practices exerted upon Mrs. Fayerweather and upon the next of kin?

Mr. Bovee: We object to the question as incompetent and calling for the conclusion or opinion of the witness.

At the request of the witness, question No. 806 was repeated by stenographer.

A. Yes, sir.

807 Re-x-Q. Was the sum of millions for which damages were sought in that action any larger than the sum of millions of the estate diverted?

436

Mr. Bovee: We object to the question as incompetent, as calling for the opinion of the witness, irrelevant and immaterial to the issue presented by the special plea, and as assuming facts which have not been proved and which cannot be.

At the request of the witness, Question No. 807 repeated by stenographer.

A. I think my recollection is that it would be very much less than the diverted estate, with interest at the legal rates.

808 Re-x Q. Was there anything notable about it in the fact that John E. Parsons was defendant?

Mr. Bovee: We object to that as incompetent, as irrelevant and immaterial to the issues presented here.

A. Well, yes, in so far as I think the community generally have a sort of impression and feeling of reverence for Mr. Parsons—I do at least feel that I must raise my hat when I come into his presence. I certainly did at the first interview when we were before Scott
437 Lord, which I think was the first, or about the first, acquaintance with Mr. Parsons; he was a man and is a man who is notable, commands the attention and admiration of the community generally, in which I earlier in my experience was in full accord, and after my years of experience that admiration has changed to one of notable indignation because of Mr. Parsons' acts in the matter. It is notable in those two ways.

809 Re-x-Q. Well, did you take that all into consideration when you decided to make him a defendant?

Mr. Bovee: Same objection.

A. I did. Earlier I would not have had the courage.

810 Re-x-Q. Did you bring the action because you thought, notwithstanding what you say of Mr.
438 Parsons, you had the evidence to support it?

Mr. Bovee: We object to that as incompetent, and as to the matter as irrelevant and immaterial to the issue presented here, and as calling for the opinion and conclusion of this witness.

Mr. Parsons: And as a gross abuse of any privilege accorded to counsel, the object being to have the witness state that he had evidence of a certain character not disclosed, and which the question asks him to state to prove the fact, which neither can be proved nor has been attempted to be proved; and upon the further

ground that the action is in accord with what has been manifest from the beginning and was avowed by the witness himself yesterday, that for the purpose of overcoming what he then described as the obstinacy of Mr. Parsons and to obtain what he stated yesterday he believed to be given by the destroyed codicil, he has brought the suits referred to on unverified complaints.

At the request of the witness, Question No. 810 repeated by stenographer.

439

A. Certainly. I then believed and I now believe that the evidence is available to prove every accusation that is made in the bill.

Mr. Bovee: We move to strike out the belief of the witness as having nothing to do with the proof in this case.

Mr. Parsons: And as being incompetent from every point of view, and as being made the occasion to put scandalous and untrue statements upon the record without even any other foundation than what the witness calls his belief.

440

811 Re-x-Q. Mr. Reynolds, have you observed during the progress of this examination whether it is a characteristic of Mr. John E. Parsons to be highly overbearing and insolent towards a witness, at the same time exhibiting a great sensitiveness and tenderness when the answers appear to reflect upon him?

Mr. Bovee: We object to the question as incompetent and leading, and irrelevant and immaterial to the questions presented here, and as a gross abuse of the privilege of counsel in the examination of a witness under the procedure in this Court.

Mr. Parsons; And as an attempt on the part of counsel to make the witness under oath state what everybody who has been present during the examination has seen and knows to be just the reverse of the assumption.

At the request of the witness, question No. 811 repeated by stenographer.

A. Very decidedly so.

812 Re-x Q. Mr. Reynolds, was there any justification that you are aware of for Mr. Parsons' insolence
441 in the question 616 wherein he says, "I make no question about your willingness to swear to anything?"

Mr. Bovee: We object to the question as incompetent, as calling for the conclusion and opinion of this witness, and as irrelevant and immaterial to the issues here. The record will show whether there was justification or not for the expression used by counsel.

At the request of the witness, question No. 812 was repeated by the stenographer.

A. It is in keeping with his treatment of myself and my wife from the early history of this contest up to date. I expect very little else from him.

442

Mr. Bovee: We move to strike out the answer of the witness as not responsive to the question, as spreading upon the record here matters as to which there is absolutely no proof whatever, and as a gross abuse by the witness of his opportunity in the witness chair to place upon the record scandalous and improper matter.

The Witness: The witness states——

Mr. Sherman: Do not argue the objections, Mr. Reynolds.

813 Re-x-Q. Was there any justification in the record for the insolent, offensive assumption in question 621 asked by Mr. Parsons, "What arrangement, if any, has been made by you and Miss Emma S. Fayerweather and Mrs. Achter, either or both, with reference to protecting them against suits maliciously brought and maliciously prosecuted by you in their names?"

Mr. Bovee: We object to the question as incompetent. The question read by counsel will speak for
443 itself without any characterization of the witness. We object to the matter as incompetent, irrelevant and immaterial to the issue presented by the pleas here.

Mr. Parsons: And furthermore, that counsel advised the witness not to answer, and under advice of counsel the witness did not answer the question.

Mr. Sherman: I withdraw the question in view of the last objection.

814 Re-x-Q. Mr. Parsons, at page 232 of the present record, in connection with question 562, says, referring to your testimony, "We call it intentional perjury." Was there any justification that you are aware of for that insolent statement upon the record?

444

Mr. Bovee: We object to it as incompetent and calling for the conclusion and opinion of the witness, and the record is the best evidence of whether there was any justification or not.

Mr. Parsons: And that reference to the record shows that the answer of witness was, "No, nothing untrue, that would mean intentional perjury which there was not anything of the kind," to which Mr. Blaikie said, Mr. Blaikie being counsel for the witness, "Oh, no, it would not be," and that it was in response to that that

Parsons said, "Well, one moment, Mr. Blaikie, we call it intentional perjury."

At the request of the witness, question No. 814 was repeated by the stenographer.

A. No, sir.

815 Re-x-Q. In reference to Mr. Parsons' sensitiveness where he is concerned, I call your attention to the testimony which you gave in answer to question 649 where you say: "If you think there has
445 been any suit brought against you and the executors for the purpose of a settlement you are entirely wrong and you had better get on to the other track about as quick as you know how, that is my advice;" Mr. Parsons then asks, question 650, "Would you not like to add something to that answer? A. I will if it will please you. I would do almost anything to gratify you;" to which Mr. Parsons observed, "Oh, no, you and I both know that it is a violation of every rule of examination to bring offensive matter of this character into the record." Was there any offense stated by you to which Mr. Parsons' remarks can apply except what you have just testified by way of testimony and reflecting in a mild way upon him?

Mr. Bovee: We object to the question as in-
446 competent; the record is the best evidence of what the witness has testified to, as calling for the characterization and conclusion of the witness.

Mr. Parsons: And furthermore that it assumes that anything that can be said by the witness or by his counsel will cause the least sensitiveness on the part of Mr. Parsons.

At the request of the witness, question No. 815 repeated by stenographer.

A. No, sir, I think not.

816 Re-x-Q. When you stated that you had already produced evidence to the attorneys for some of the colleges to establish a trust, did you refer to that evidence which appears in the five college record as having been the basis of the decision of the Court in the first place before Judge Truax, that there was a secret trust?

Mr. Bovee: We object to the question as incompetent, and as irrelevant and immaterial to the issues presented by the special plea.

447

At the request of the witness, question No. 816 was repeated by the stenographer.

A. Yes, sir.

817 Re-x-Q. When you speak of efforts to defeat that trust do you refer to the decision in the five college action that there was a secret trust, but that it was a testamentary trust and, therefore, invalid under the Statute of 1860?

Mr. Bovee: We object to the question as incompetent in that it calls for the opinion and conclusion of the witness and as irrelevant and immaterial to the issues here.

448

At the request of the witness question No. 817 repeated by stenographer.

A. Yes, sir.

Adjourned to February 5, 1901, at 10.30 A. M.

JOHN B. REYNOLDS.

NEW YORK, February 5, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. PARSONS, Mr. BOVEE, Mr. CARNOCHAN, a representative of Nash & Jones, Mr. Fain, Mr. McLaughlin, a representative of Russell & Holmes, and a representative of Root, Howard, Winthrop & Stimson.

449

Continuation of the RE-CROSS EXAMINATION of JOHN B. REYNOLDS:

By Mr. Sherman:

818 Re-x-Q. Mr. Reynolds, of what State were you a citizen on the 29th of June, 1897, and during the month of June, 1897? A. Of Vermont.

819 Re-x-Q. The action which was brought in Mrs. Fayerweather's name against the defendants in her life time, was it authorized by her?

Mr. Bovee: We object to it as irrelevant, incompetent and immaterial to the issues presented upon
450 the special pleas, and calling for a conversation or transaction between the witness and deceased, Mrs. Fayerweather, and contrary to Section 829 of the Code of Civil Procedure, and calling for the conclusion of the witness.

A. It was.

820 Re-ex-Q. (Handing paper.) Look at the paper which I now hand you and state whether that was signed by Mrs. Fayerweather as it purports? A. It was.

Mr. Sherman: I offer it in evidence.

Mr. Bovee: I would like to see it.

Mr. Sherman: Certainly, let him see it.

Paper handed Mr. Bovee.

Mr. Bovee: Defendants object to the paper as irrelevant and immaterial to the issues presented upon the special pleas; they also object to it as incompetent, in that such power of attorney was canceled by the death of Mrs. Fayerweather on the 12th of July, 1892, less than two months after the execution of the paper.

451 We also object to the paper as incompetent as evidence of the declaration contained therein of the knowledge and condition of Mrs. Fayerweather, not in any way binding upon the defendants here.

The paper was marked Complainants' Exhibit No. 1, February 5, 1901. C. B.

Complainants' Exhibit No. 1 is as follows:

TO WHOM IT MAY CONCERN, KNOW ALL MEN BY THESE PRESENTS:

THAT WHEREAS, I, LUCY FAYERWEATHER, of the City, County and State of New York, widow of Daniel B. Fayerweather, late of said City, deceased, have hitherto, to wit: since the 12th day of June, A. D. 1891, passively acquiesced in, and assented to, the

452 terms of compromise and discontinuance, effected on or about said date, of a certain proceeding at law then pending in and before the Surrogate's Court of the County of New York and State of New York, entitled, in the matter of the Probate of the last will and testament of Daniel B. Fayerweather, deceased, wherein I the said Lucy Fayerweather, and others, were parties plaintiff, and the executors of the last will and testament of said Daniel B. Fayerweather, deceased, were parties defendant;

AND WHEREAS, my said passive acquiescence in and submission to the terms and conditions of said compromise and discontinuance were due to my condition of physical weakness, the result of protracted illness, whereby I was at the time of said compromise and discontinuance, and long afterwards continued to be, unfit

and practically incapacitated to transact business and to rightly understand the terms of said compromise and its consequences to myself and those dependent upon me, which consequences I now understand and deplore and am no longer willing to acquiesce in or be bound by.

Now, THEREFORE, reposing special confidence and trust in John B. Reynolds, in the City, County and State of New York, I hereby constitute and appoint the said John B. Reynolds to be my true and lawful attorney in fact, for me and in my name, place and stead to promptly use all lawful means for the annulling and setting aside, or modification in my favor, as he
453 may under the advice of counsel skilled in the law elect, of said compromise, and of each and all of the acts in any way affecting me or my interests thereunder.

Hereby authorizing and empowering my said attorney in my name to employ counsel; to bring any and all proceedings and suit or suits at law and in equity in and before any court or courts in said State or elsewhere; to carry on and prosecute the same and defray at my own proper charge and cost the necessary expenses thereof; to make and execute in my name any and all contracts and other papers which may in his discretion be necessary or convenient to the initiation and conduct of any proceedings, suit or suits for the enforcement of my right to the possession, ownership and enjoyment of a reasonable and satisfactory share of the property and estate of my said husband, the late Daniel B. Fayerweather, deceased; and to do and per-
454 form every act and thing whatsoever requisite and necessary to be done in and about the premises as fully, to all intents and purposes, as I might or could do if personally present, without power of substitution, hereby ratifying and confirming all that my said attorney, the said John B. Reynolds, shall do or cause to be done by virtue thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and seal on the 4th day of June, in the year of our Lord one thousand eight hundred and ninety-two.

LUCY FAYERWEATHER. [SEAL.]

Sealed and delivered in presence of—

JOHN GOODE.

City and County of New York, ss.:

On this fourth day of June, 1892, before me personally came the above named Lucy Fayerweather, to me known and known to me to be the person described in and who executed the foregoing instrument, and she acknowledged to me that she executed the same for the uses and purposes therein mentioned.

JOHN GOODE,
[SEAL.] Notary Public (119),
New York County.

455

821 Re-x-Q. (Handing paper.) Look at the letter which I now hand you and state whether that is the only writing from F. R. Coudert to Mrs. Fayerweather which has come into your possession relating to the proposed settlement, or containing any advice in reference thereto to Mrs. Fayerweather from Mr. Coudert or from his firm or office.

Mr. Bovee: We object to this as irrelevant, immaterial and incompetent, as calling for the opinion of the witness and his conclusion and not a fact.

At the request of the witness, question No. 821 repeated by stenographer.

456

Mr. Bovee: We further object to the question as leading and incompetent.

A. Yes.

Mr. Sherman: Mark it for identification.

The paper was marked Complainant's Exhibit No. 2 for identification, February 5, 1901, C. B.

822 Re-x-Q. Are you now willing to waive the objection to its production in response to the question of

defendants' counsel which you formerly made under Section 829 of the Code? A. As applied to this letter, yes.

823 Re-x-Q. During your examination by Mr. Parsons you were asked Question No. 732, which is as follows: "Is it not the fact that having been authorized by them to represent them in their claims against Mr. Fayerweather's estate, you subsequently made an effort to bring about a settlement in which you threw them overboard altogether, and said that if provision
457 could be made for you as Mrs. Fayerweather's executor, and for Mrs. Reynolds, it would be a complete settlement of everything?" While that question was being asked you, did Emma S. Fayerweather, one of the complainants in this suit, sit near you in the same room?

Mr. Parsons: One moment.

A. She did.

Mr. Parsons: Wait one moment. The objection which I wish to have recorded before the answer is that under the advice of his counsel the witness declined to answer the question, and that whether or not Emma S. Fayerweather was present is entirely immaterial,
458 that the witness had the opportunity at the time of stating what was the fact in regard to the question, but that he saw fit to leave it unanswered, and that for that reason if for no other, what were the circumstances which surrounded the question are immaterial.

Mr. Sherman: Now what is the answer?

The Witness: She did.

824 Re-x-Q. While Mr. Parsons was asking you that question did he hold in his hand what purported to be a letter?

Mr. Parsons: Objected to upon the ground that it is

incompetent, irrelevant and immaterial, and that the witness cannot truthfully state what purported to be anything which Mr. Parsons did or did not hold in his hand. Either he knew or he did not know, and in the event that he did not know it is impossible that he should make a truthful answer.

At the request of the witness, question No. 824 was repeated by stenographer.

459

A. He held in his hand a paper shaped like a letter with its back towards me, asking me if I wrote a letter, looking on the letter or on the paper for the purpose as I call it of getting the date or its contents, and he gave me the impression that he had gathered from the letter something which might be construed or tortured into some expression tending to carry that idea to Miss Fayerweather.

Mr. Parsons: The answer is objected to upon the ground that it not only goes beyond the question, but that in large part it consists in an attempt on the part of the witness to make statements which are not in the nature of evidence and which he knows not to be in the nature of evidence.

460

825 Re-x-Q. Mr Reynolds, do you observe that while you are presently being examined Mr. Parsons and Mr. Bovee are exchanging consultations in reference to your examination in a tone audible to everybody in the room and extremely offensive and insulting to you, in that Mr. Parsons stated to Mr. Bovee that if Mr. Bovee should look at your testimony it would appear that you had testified in entire contradiction to this last answer.

Mr. Parsons: Objected to upon the ground that the statements of counsel, although in the form of a question, do not constitute evidence and are inadmissible; upon the further ground that with a table three or four feet wide between the witness and counsel there is no mode of conference between Mr. Bovee and Mr. Parsons which, if the witness sees fit to play the part of an eavesdropper, he may not hear.

At the request of the witness, question No. 825 was repeated by stenographer.

461

Mr. Parsons: I will ask that gentleman over there to observe the question and the answer; I may want to call him as a witness later.

The Witness: Mr. Parsons talks so much I cannot keep my mind on the question.

Mr. Sherman: Will you hear it read again.

The Witness: I will.

Question No. 825 again repeated by stenographer.

A. Yes, sir.

462

626 Re-x-Q. Was it necessary for you to play the part of eavesdropper to hear that? A. I do not think it would have troubled anybody on this side of the table or within ten feet of him to have heard the remarks or any part of them.

827 Re-x-Q. Was it possible to avoid hearing the remarks just referred to? A. It was not possible for me to.

828 Re-x-Q. Mr. Parsons was asked upon his exam-

ination, Question No. 385: "I think you have missed the point in my question, Mr. Parsons. I call your attention to the parade which you made before Miss Fayerweather of the letter so calculated as to create the impression that you were taking from some letter written by Mr. Reynolds a proposition made by him to settle this case, in disregard of his obligations to Miss Fayerweather. Now, will you state whether that letter contains anything of the kind?" To which Mr. Parsons answered: "A. I made no parade of the kind
463 asserted. The statement of counsel that I made such a parade is untrue. And I decline to answer a question on any such false assumption," Is that statement of Mr. Parsons' in answer to that question true or false?

Mr. Bovee: We object.

Mr. Parsons: No, no, Bovee, I will let that go.

At the request of the witness, question No. 828 was repeated by stenographer.

A. It was perfectly apparent to me that Parsons' purpose was to create a feeling of distrust on the part of Miss Fayerweather, and I certainly feel that his statement in regard to what his intentions were is false, and I am confident that it was so understood, that is,
464 understood as I did, by several parties in the room at the time besides myself and Miss Fayerweather.

Mr. Parsons: The answer is objected to upon the ground that counsel for the defense having been willing that the witness should answer directly, if he could do so or were willing to do so, he has, instead of answering directly, made a statement talking about the intentions of Mr. Parsons and other persons, which is manifestly incompetent.

829 Re-x-Q. Did Mr. Parsons then make a parade of the letter?

Mr. Parsons: Objected to upon the ground that that does not call for a fact; as incompetent, irrelevant and immaterial; that there is no evidence yet that it was a letter; that there was any letter; the witness has simply said that he believes there was a letter.

At the request of the witness, question No. 829 was repeated by stenographer.

A. Yes, sir; as prominently as he would if he were a mateador with a red flag in a bull fight.

465

Mr. Sherman: You may re-examine Mr. Reynolds.

RE-REDIRECT EXAMINATION by Mr. Parsons:

830 RD-Q. Will you swear positively that on the occasion last inquired about, Mr. Parsons had in his possession any letter? A. I will swear that he pretended to have.

831 RD-Q. Will you swear positively that on the occasion last inquired about, Mr. Parsons had in his possession any letter? A. He convinced me that he had by his efforts.

832 RD-Q. Will you swear positively that on
466 the occasion last inquired about, Mr. Parsons had in his possession any letter? A. I will swear he said so, had said so in his testimony.

833 RD-Q. I repeat my question. Will you make a positive statement under oath to the effect that my question asks?

Mr. Sherman: I object, on the ground that the question has been three times answered, and that this counsel has testified under oath that he had a letter, although he did testify that he knew not the date of it, the signature to it, the person to whom it was addressed, nor any matter of substance thereof.

At the request of the witness, Question No. 833 was repeated by stenographer.

A. Well, my best information is gathered from Mr. Parsons' own statement under oath, which I have not always found to be correct.

834 RD-Q. Well, do you not see that you have just convicted yourself of testifying to a belief that you had on an occasion when you testified that Mr. Parsons had a letter, and when, according to your present testimony, you did not know that such was the fact?

467

Mr. Sherman: Objected to on the ground that it is apparent from the record that what the witness has testified to is that Mr. Parsons made such a parade of what Mr. Parsons tried to convey to those about was a letter as to justify the statement in connection with the use which Mr. Parsons made of it that he was making a parade of what he intended to be understood as a letter, for the purpose of falsely misleading this witness into the belief that he had some letter, or at any rate of falsely misleading the complainant, Emma S. Fayerweather, into the belief that Mr. Parsons had such letter, and in order
468 to intimidate and influence the course of the complainants in this proceeding.

At the request of the witness, Question No. 834 repeated by stenographer.

Mr. Sherman: And on the further ground that the witness has not testified that Mr. Parsons had a letter, and that the fact whether he had a letter rests solely upon his own testimony, which is not corroborated by the production of the letter, although called for.

At the request of the witness, Question No. 834 was repeated by the stenographer.

A. No, sir; I do not see any such thing.

835 RD-Q. You testified in answer to your counsel that pending the examination reference was made by Mr. Parsons to a charge or to something which had occurred in a libel suit, and in that connection you said something about blackmailing. I want you to repeat what, under oath, you will state to your own knowledge to have occurred in respect of that matter.

469

Mr. Sherman: Objected to on the ground that the question misstates the testimony, that there is not a word in the testimony about a libel suit, and that therefore the hypothesis of the question is entirely unfounded.

At the request of the witness, Question No. 835 was repeated by the stenographer.

Mr. Parsons: Leave out the word libel.

Mr. Sherman: I object.

Mr. Parsons: I will repeat the question, omitting the word libel, then.

470

836 RD-Q. You testified, in answer to your counsel, that pending the examination reference was made by Mr. Parsons to a charge or to something which had occurred in a suit, and in that connection you said something about blackmailing. I want you to repeat what, under oath, you will state to your own knowledge to have occurred in respect of that matter? A. I do not think I know what Mr. Parsons inquires for. If you read the testimony it refers to, I can give a correct and definite answer, and am very willing to.

837 RD-Q. Precisely. That is exactly what I do not propose to do. I want to see if twice you can give the same version of the same transaction, and, therefore, without repeating the testimony again. I wish you to testify as to whether upon your examination by your counsel you said anything about the occurrence as to which you said there was used the term blackmailing or any such expression?

Mr. Sherman: I object to the question as grossly improper, impertinent and insulting. I protest that
471 the counsel has no right to address the witness in such terms or to use the expressions embodied in the question, and I ask that the objection be certified to the Court, and I decline to proceed with the examination further until it shall be decided by the Court. I will send for the Examiner.

Mr. Parsons: I desire that the Examiner shall be here.

838 RD-Q. Did you on any occasion during your examination testify to something as having occurred in connection with which was used the term blackmailing or any similar term?

472

Mr. Sherman: Mr. Reynolds, do not answer or take further part in this proceeding until the Examiner has certified this record to the Court.

At this point the Examiner came in.

Mr. Sherman: Mr. Examiner, Mr. Parsons has seen fit to ask this witness a question preceded by the most grossly insulting statement of his purpose in asking it, and I propose to see if that can be done

in this Court, and I ask you to certify to my objection to the Court.

Question 837 repeated by stenographer.

Mr. Parsons: Mr. Shields, we went over this performance once before, and Judge Lacombe held that it was for me to determine whether the witness should answer a question that I put to him, that if he declined to answer, I could ask another question, and I propose to ask another question and to go on with the examination.

473

Mr. Sherman: I submit it is for us all to determine on this side whether we should submit, under the guise of the privilege of counsel, to such gross affronts which, if they were to happen anywhere else, would result in Mr. Parsons' nose being pulled, and very justly. Read the question.

Mr. Parsons: It is not necessary.

Mr. Sherman: I want the question read. I think this counsel ought to be taught propriety, and I am going to see if it cannot be done.

The Examiner: Read the question.

Question 837 repeated by stenographer.

474

The Examiner: I will certify that objection to the Court, if you want it certified, and you can go on with the examination.

The Examiner so certifies.

839 RD-Q. Is not this what occurred on the occasion to which you testified that Mr. Shields, the Examiner, being in the room, he asked Mr. Parsons whether he had heard Judge Wallace's charge in a newspaper libel

suit, referring to a charge which had been delivered by Judge Wallace on the occasion when counsel for the defense being also counsel for the defense in the suit brought against the United Dressed Beef Company, being in attendance before Judge Wallace to take your default because you would not go to trial, Judge Wallace delivered a charge which did not come from a newspaper statement about a suit which had been brought for blackmailing purposes, and Mr. Shields having been clerk and having been present, he, during the
475 examination here, asked Mr. Parsons whether he desired a copy of the charge, and Mr. Parsons said he did, that and Mr Shields said that he would obtain it for him ?

At the request of the witness, Question 839 was repeated by stenographer.

Mr. Sherman: Objected to on the ground that under the pretext of asking for a version of the matter to which the witness testified the counsel for the defense interpolates in his question a number of untrue assumptions of fact. of matters entirely irrelevant and immaterial to this action, and on the ground that the question is not redirect examination, but is evidence at large in the cause.

476

A. I do not think there is an attorney or a layman in the room who can make an intelligent answer to that question. I cannot, I am sure.

840 RD-Q. Have you now given the best answer that you can to that question ? A. I think it is the only one that I can make.

841 RD-Q. Where is Emma S. Fayerweather now ? A. She is at No. 11 East Fifty seventh street, I suppose; she may have gone out shopping, perhaps.

842 RD-Q. Are you willing now to produce the agree-

ment between her and yourself under which was commenced or which relates to the commencement of this suit.

Mr. Sherman: Objected to as immaterial and irrelevant, as privileged, and I advise the witness to decline to answer.

The Witness: Under advice of counsel, I decline to answer.

843 RD-Q. You have been examined by your counsel to day on the subject of a letter as to
477 which you have testified that Mr. Parsons in his testimony said something about it. Did you ever write a letter to Mr. Ritch upon the subject of a settlement?

Mr. Sherman: Objected to as immaterial and incompetent, and on the ground that the letter is the best evidence, and inasmuch as the letter appears to be within the power of the defendants, I advise the witness to decline to answer.

At the request of the witness, Question No. 843 was repeated by stenographer.

A. It is quite possible, and I would be very
478 glad to have Mr. Ritch produce everything that I have ever written to him on the subject, or Mr. Parsons either; I have written to both of them.

844 RD-Q. Have you a copy of any letter written to Mr. Ritch? A. I cannot say without looking at my book. I believe I have got a copy of everything that I ever wrote to him.

845 RD-Q. Have you never looked to see whether you have a copy of a letter written to Mr. Ritch?

Mr. Sherman: Objected to as immaterial.

A. I do not think I have. I think I have got a clear

memory in regard to those transactions. I know there is nothing I am ashamed of in any one of them in any spot or place on earth or in heaven.

846 RD-Q. Have you understood me to ask about occurrences of which you, John B. Reynolds, would be ashamed? A. Yes.

847 RD-Q. Well, then, please to understand that I have not asked you any such question. A. That is the impression I got by your parading that letter before me the other day.

479

848 RD-Q. And what I want to know is whether you have a copy of a letter written by you to Mr. Ritch relating to a settlement, and if you cannot from present recollection say whether you have or not, I wish to have you answer whether you made any search in your letter-books to see whether you have a copy of such a letter.

Mr. Sherman: Objected to on the ground that defendants' counsel having upon request declined to produce the original, which is the only letter apparently answering the description embodied in the question, it is not competent for them to give secondary evidence of its contents or make any inquiry for the purpose of
480 laying a foundation for secondary evidence of its contents, and I therefore advise the witness to decline to answer.

The Witness: Without any other reason than the advice of my counsel, I decline to answer.

849 RD-Q. Are you not mistaken in your testimony which you gave about the bequest to Mrs. Reynolds in the will of Mrs. Fayerweather? I understood you to say that the will gave to her $10,000.

Mr. Sherman: Objected to on the ground that the will is the best evidence; that it is a matter of public record; that it is entirely accessible to counsel, and that the inquiry is therefore entirely immaterial.

At the request of the witness, Question No. 849 was repeated by stenographer.

Mr. Parsons: I wish to give you the opportunity of correcting your testimony if you desire to do so. If you do not desire to do so I shall assume that you stand by the testimony which you previously gave. Now, you can have your choice about it.

Mr. Sherman: Objected to on the ground that the counsel for the defendants exceeds his rights and privileges in making such a speech to the witness in
481 advance of the suggestion from the witness that he desires to make any correction in his testimony.

A. If I remember my testimony correctly the $10,000 which you refer to related to the residuary estate, and I remarked at the time that the residuary estate had been an expensive legacy, that is my memory of it.

850 RD-Q. Do you wish to make any correction in the testimony which you gave about Mrs. Fayerweather's provision for Mrs. Reynolds?

Mr. Sherman: Objected to on the ground that the will itself is the best evidence and supplies the only authentic source of correction for any mistakes that may have been made.

482

A. I will make an addition to it, that Mrs. Reynolds never received any other benefit from Mrs. Fayerweather's will except the residuary part.

Mr. Bovee: Mr. Sherman, we would like that power of attorney that you put in evidence (paper handed Mr. Bovee).

851 RD-Q. (Handing paper.) Your counsel put in evidence to-day a power of attorney from Mrs. Fayerweather to you, bearing date June 4, 1892. By whom

was that power of attorney drafted? A. It was drafted by Colonel William T Holt.

852 RD-Q. In whose handwriting is the manuscript part of it? A. It is in the handwriting of William Blaikie.

853 RD-Q. Was Mr. Blaikie acting professionally for you at the time? A. At the time the power of attorney was executed, yes.

854 RD-Q. Did Mr. Blaikie ever see Mrs. Fayerweather? A. I think so; that is my memory, that he did.

483

855 RD-Q. Have you any knowledge that he did? A. Well, I have not any doubt of it in my mind, but I cannot positively swear as to time and place,

856 RD-Q. Did Mr. Blaikie have anything to do with the preparation of this power of attorney, the manuscript part of which you state to be in his handwriting? A. He copied it from the draft which Colonel Holt made in Mrs. Fayerweather's house, after having had a very long talk with Mrs. Fayerweather, and, I think, repeated talks with her, and then Mr. Blaikie—Colonel Holt, if I remember right, recommended me to employ Mr. Blaikie; I think that was the history of the transaction.

484

857 RD-Q. Where is Colonel Holt? A. He is with Mrs. Fayerweather.

858 RD-Q. Where is Colonel Holt? A. Well, I believe he is in Heaven.

859 RD-Q. Is he living or dead? A. I think he is living in Heaven; that is my belief.

860 RD-Q. Were you present on the occasion of any interview between Colonel Holt and Mrs. Fayerweather?

A. I do not remember whether I was at all times or not; I was a part of the time.

861 RD-Q. Where?

Mr. Sherman: Objected to under Section 835 of the Code and under Section 829 of the Code, and I advise the witness not to answer. Have you stated that Mr. Holt was an attorney, Mr. Reynolds?

The Witness: I have not. He was, though.

485

862 RD-Q. Are you willing to answer my question? A. I am perfectly willing to if my counsel so advises; I would be rather glad to.

863 RD-Q. Answer it then? A. Counsel advises me otherwise.

864 RD-Q. Am I to understand from that answer that under the advice of counsel you decline to answer? A. That is what I intended you to understand.

865 RD-Q. Do you remember the testimony that you have given about a suit which was brought before the commencement of the Five Colleges suit, and the complaint in which was dismissed for want of prosecution by you?

486

Mr. Sherman: Objected to on the ground that whether the suit was dismissed, and the grounds thereof, must appear by the record; and I further object to it as evidence in chief in the cause.

At the request of the witness, Question No. 865 was repeated by stenographer.

A. I remember there was some discussion regarding it; yes, sir.

866 RD-Q. Did you verify the complaint in that suit on December 6, 1892, and did you in your com-

plaint in that suit pray the Court that it should declare and adjudge that said plaintiffs, Thomas G. Ritch, Justus L Bulkley and Henry B. Vaughan were to be held and declared to hold such residue and remainder of said estate, referring to the estate of Mr. Fayerweather, mentioned and referred to in said will and four codicils, as trustees for said plaintiffs herein, and that said plaintiffs are the owners of said property as *cestuis que trustent* of said property? I hand you a copy of the complaint to refresh your recollection, if you desire.

487

Mr. Sherman: Objected to on the ground that the original complaint is the best evidence, that it does not appear to be inaccessible, and that the matter is new matter at large in the case and not redirect examination, and on the ground that the printed copy so called tendered the witness has no tendency to aid but only to mislead him. I ask that the paper be marked for identification.

Mr. Parsons: I have no objection.

The paper was marked Complainants' Exhibit No. 3 for identification, February 5, 1901, C. B.

488

At the request of the witness, Question No. 866 was repeated by stenographer.

A. I did verify the complaint as appears, and I believe it to be true except for the clerical errors to which you called my attention on the part of my counsel, and I am very glad to state that I believe there are no intentional errors yet on their part, discovered in any of them, which is an exception among the attorneys, most of them that I have had to deal with in this case.

867 RD-Q. Well, do you mean that any errors that you have made on your examination are intentional or that they are unintentional?

Mr. Sherman: Objected to as hypothetical, speculative, there not appearing to be any errors to be explained, as utterly trivial and improper.

Mr. Parsons: I state to the witness that we shall hold him to the text of his answers. If he desires to say that errors are unintentional he has the opportunity of doing it.

289

Mr. Sherman: I object to this statement on the record by the counsel of the defendants, in line with the general policy of an attempt to intimidate the witnesses herein.

868 RD-Q. Is the mistake in the prayer for judgment about which you have been asked and which you ascribe to your counsel, and which you disallow on your own behalf, in the fact that Messrs. Thomas G. Ritch, Justus L. Bulkley and Henry B. Vaughan are stated to be plaintiffs when they were defendants, is that the mistake?

290

Mr. Sherman: Objected to on the ground that by the Code of Civil Procedure such obvious and trivial errors are disposed of as matter of law by disregarding them, and that this waste of time indulged in by counsel for defendants in magnifying and commenting on clerical errors is incompetent, irrelevant and immaterial and evidence at large in the cause.

At the request of the witness Question No. 868 was repeated by stenographer.

A. I think, that is the way the complaint which you

hold, the printed complaint which you hold, would be read.

869 RD-Q. Do you remember the testimony which you gave to the effect that a reason for acquiescing in the dismissal of the complaint in that suit was the opportunity which would be afforded to you in the Five Colleges suit of being joined as defendant and making the same case as defendant which in your own suit you could make as plaintiff?

291

Mr. Sherman: Objected to on the ground that the matter has been fully answered, that there is no justification for the protracted repetition of the questions and answers in previous parts of the record, that it is oppressive and burdensome to the complainants, that it increases the expense and labor involved in the proof of their case, and on the ground that what the witness testified will appear by the record, and that he is entitled, as the examining counsel did when he was a witness, to decline to respond to such questions otherwise than to refer to the record as to what he had testified.

At the request of the witness, Question 869 was repeated by stenographer.

292

A. I remember something of that kind, but not in detail, as you have recited in your question.

870 RD-Q. Who was your attorney in the Five Colleges suit?

Mr. Sherman: Objected to on the ground that it already fully appears by the record.

A. Col. E. C. James and William Blaikie.

871 RD-Q. Was Colonel E. C. James your attorney or was he of counsel, Mr. Blaikie being your attorney?

Mr. Sherman: Same objection.

A. I suppose he would be called a counsel; Colonel James would be the counsel and Mr. Blaikie would be the attorney.

872 RD-Q. Do you remember the judgment in the Five Colleges suit entered on July 6, 1897, by direction of Mr. Justice Pryor?

493

Mr. Sherman: Objected to as evidence at large in the cause, as not redirect-examination and as immaterial.

At the request of the witness, Question No. 872 was repeated by the stenographer.

A. I remember there was a judgment rendered by Justice Pryor; the date I cannot recall.

873 RD Q. That judgment provides as follows:

"And it is further adjudged and decreed that out of the residuary estate in the hands of the said defendants, Ritch, Bulkley and Vaughan,
494 they pay over to to the Knickerbocker Trust Company of the City of New York, either in cash or mortgages as above stated, the sum of $125,000, to be received by the said trust company upon the following trusts, to wit, to invest the same and to pay over the income thereof to the extent of $4,000 per annum to Anner Amelia Reynolds during the term of her natural life in semi-annual payments, and upon her death to distribute the said sum and the income which may have accumulated thereon equally between the institutions named in the ninth paragraph of the will of said

Daniel B. Fayerweather, share and share alike. Should the income be insufficient to pay the said $4,000, then the deficiency is to be made up out of principal."

The judgment states that it was entered, counsel who were named appearing, and among others is mentioned William Blaikie, Esq. Has Mrs. Reynolds received the income so provided for?

495

Mr. Sherman: Objected to on the ground that there is no evidence of any judgment embodying any such provisions; that to embody its provisions in the question whether assented to or not by the witness, is not competent evidence of any such judgment; and on the further ground that the provisions in that judgment, if any, for Anner Amelia Joyce, now the wife of the witness, has no legal tendency to estop or conclude the complainants or any of them; that whether or not Mrs. Reynolds has seen fit or not to avail herself of the provisions of the judgment is a circumstance wholly immaterial to the rights and remedies of this witness as complainant in the cross-bill herein; and on the
496 further ground that this is not redirect examination of this witness, but is evidence at large in the cause, whereupon the complainants claim and will claim that by going into such evidence these defendants have waived and do waive their plea, and place all the issues herein at large.

At the request of the witness, Question No. 873 was repeated by stenographer.

A. Mrs. Reynolds was given that $4,000 a year, and the restriction which Mr. Ritch put upon it in the will, as I regard a hook in her mouth, unknown to Mr. Fayer-

weather as to limiting it to the time when she should be married, was removed on the 11th of November. Mr. Parsons well knows that fact, Mr. Ritch knows it, Mr. Vaughan knows it, Prescott Hall Butler knows it, and they have put it into the deed of gift, very adroitly, to show that the executors through their generosity removed it. Mr. Fayerweather was so angry with Mr. Ritch for having put it into the will that he would never see him again, and he never did see him again after the 11th day of November, 1890; and Justice Pryor was the cat's paw to administer a fragment of justice to
497 Mrs. Reynolds. It should never have been embarrassed by any such circumstances, and everybody who had anything to do with it, not excepting Mr. Parsons, ought to hide his head in shame for alluding to it on an occasion like this.

Mr. Parsons: The answer is objected to for perfectly obvious and apparent reasons. The witness has already stated that he never knew Mr. Fayerweather, and could not know what passed between Mr. Fayerweather and anybody else. All of his statements are irrelevant to the question which is put to him.

The Witness: But true. Mr. Parsons knows them to be true. I defy him to deny it, to deny that he has not that knowledge just as I have stated it.

498

Mr. Parsons: To settle that question once for all, Mr. Parsons will deny it and say that that statement is absolutely untrue so far as Mr. Parsons knows.

Mr. Sherman: I object to the remarks of Mr. Parsons on the ground that while the witness is under oath Mr. Parsons is now putting his unsupported statement against the witness' oath; and I move to strike Mr. Parsons' statement from the record.

Mr. Parsons: Now, answer my question.

At the request of the witness, Question No. 873 was repeated by stenographer.

A. She has received that income; she has not received the title to the tomb which was agreed to have been given her through Mrs. Fayerweather,; and through the efforts of Mr. Parsons and others Judge Pryor held in perfect defiance of the agreement on the part of the executors, in defiance of Mr. Parsons so far as Mr. Bulkley and Mr. Vaughan are concerned——

499

At the request of the witness, the answer thus far given was repeated by stenographer.

The Witness: I want to change that.

Mr. Parsons: No, I object.

The Witness: In defiance of the agreement of the executors that they would convey that tomb to Mrs. Fayerweather it was decided that it should be conveyed to Mrs. Morris B. Beardsley and an appropriation made to put it in repair and maintain it in repair against my protest as executor of Mrs. Fayerweather, and they have since undertaken to assume control of Mr. Fayerweather's tomb, and they have so embarrassed
500 the real owuership of it that poor Mr. Fayerweather's remains remain to-day in a condition repulsive to consider. They have put it, through Judge Pryor's unrighteous decision, in such shape that there is no legal power without a special act of the Legislature that can touch it to make the necessary repairs. Mr. Parsons well knows that I have tried in every way to yield and to bring about a reasonable way to at least protect from the inclemency of the weather and storm the remains of Mr. Fayerweather, who tried to do a noble, generous deed in disposing of his property.

Mr. Parsons: We object to all of the answer which follows the first sentence to the effect that Mr. Reynolds has received that income, on the ground that it is not responsive, that it is immaterial, irrelevant and incompetent, and we move to strike it out.

874 RD-Q. What do you mean by the noble and generous deed of Mr. Fayerweather?

Mr. Sherman: Wait a minute. That is objected to as immaterial, as cross examination upon an answer
501 which the counsel has moved to strike out as not responsive, and the counsel for the complainants consents that it be stricken out on the ground that it was not responsive to the question.

875 RD-Q. The question is, what do you mean? A. I suppose if it be stricken out I do not mean anything.

876 RD-Q. Do you mean the acts of Mr. Fayerweather under which his residuary estate is to go to colleges?

Mr. Sherman: Objected to as immaterial and on the ground that the witness' opinion of the amount or degree of commendation to be attributed to Mr. Fayerweather because of any of his devises is wholly irrelevant and immaterial to any issue in this cause,
502 on the ground that the query is not redirect examination, and is evidence at large in the cause. And counsel for the complainants protest that this examination is so far outside any right of redirect examination as to be an abuse and a waste of time of complainants, and advises the witness not to answer.

877 RD-Q. Do you decline to answer? A. I shall be obliged to under advice of my counsel.

878 RD-Q. Is it not you who are trying to prevent the accomplishment of that noble and generous action on the part of Mr. Fayerweather, and are not the counsel

for the defense trying to accomplish it against all efforts and attempts on your part?

Mr. Sherman: Objected to on the ground that the commendation or disapprobation of this witness of the course pursued by any parties to this litigation cannot be evidence in the cause, that the question is obviously trivial and a waste of time, and I advise the witness not to answer.

503

879 RD-Q. Do you decline to answer? A. I shall be obliged to under the advice of my counsel very much against my wishes.

880 RD-Q. Down to what time has Mrs. Reynolds received that income?

Mr. Sherman: I repeat the objection made to the inquiry about the alleged judgment where it was first asked to-day.

At the request of the witness, Question No. 880 was repeated by the stenographer.

A. I think she has received it quarterly up to date.

881 RD-Q. What have you done about it?

504

Mr. Sherman: Objected to as wholly immaterial and irrelevant and outside of the cause, and as evidence at large in the cause.

A. Well, I think I went to the trust company to find out what loans had been made ~~to that company.~~ of that money

882 RD-Q. How often? A. How often?

883 RD-Q. Yes.

Mr. Sherman: Same objections.

A. I do not think I have ever been but once.

884 RD-Q. When was that? A. I could not say; within the last year or two.

885 RD-Q. What have you done about the receipt of the income?

Mr. Sherman: Same objections.

886 RD-Q. Have you collected it yourself for Mrs. Reynolds? A. No, sir.

505

887 RD-Q. Have you talked with Mrs. Reynolds about it?

Mr. Sherman; Objected to on the ground of privilege, and I advise the witness not to answer.

The Witness: Under advice of counsel I decline to answer.

888 RD-Q. Has the income gone to the support of the Fayerweather house, in which you and Mrs. Reynolds live, and your and her maintenance there?

Mr. Sherman: Objected to on the ground that
506 this witness having been called as a witness for the defendants, no such inquiry is proper, relevant or competent; and I advise the witness to decline to answer.

The Witness: Under advice of counsel I decline to answer.

Adjourned to February 14, 1901, at 10.30 A. M.

JOHN B. REYNOLDS.

NEW YORK, February 14, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. BOVEE, a representative of Root, Howard, Winthrop & Stimson, Mr. Carnochan, Mr. Fain, a representative of Nash & Jones, and a representative of Russell & Holmes and Mr. Parsons.

507

Continuation of the REDIRECT-EXAMINATION of JOHN B. REYNOLDS:

By Mr. Parsons:

889 RD-Q. Referring to the talk about settlement which you attributed to representatives of the colleges as you described them, I wish to know whether this is what occurred, that you called upon Mr. Putney of the firm of Putney & Bishop, and made to him a proposal for a settlement? A. After the talk which I alluded to in my testimony that is a fact, but the first beginning of it was Mr. Cooke coming to me.

508

890 RD-Q. Do you remember what was the proposal that you made to Mr. Putney?

Mr. Sherman: Objected to as immaterial and on the ground that negotiations for compromise are never to be given in evidence.

Mr. Parsons: The witness volunteered a statement about a compromise and it is for that reason that we propose to cross examine him upon the subject.

Mr. Sherman: The objection is renewed upon the ground that it obviously relates to some other occasion than any as to which the witness has testified.

At the request of the witness Question 890 was repeated by stenographer.

A. I have a general remembrance of it, I do not think I could recite it in detail. There was a good deal of effort on the part of many that I have not mentioned, among them Salem H. Wales came to see Mrs. Reynolds ——

891 RD-Q. I am asking about the proposal that you made to Mr. Putney, did you understand my question? A. I understand you perfectly, Mr. Parsons.

509

892 RD-Q. Will you kindly answer that question? A. I am going to give you a true history of that or I am going to give you none.

893 RD-Q. I object to voluntary statements by you at all events until you have answered my question. A. Mr. Root came to see Mrs. Reynolds in regard to it. Charles C. Hall came to see Mrs. Reynolds about it. I went to the treasurer of the Union Theological College, the Union Theological Seminary, I think it is called, I had two or three interviews with him; I also went to see D. Willis James and Mr. Hubbard; and I proposed
510 that Mr. Putney and D. Willis James and Mr. Root should be made a committee on the part of the colleges to treat with me on the subject, that was my proposition, although there was perhaps some subsequent talk with Mr. Putney independent of the others.

894 RD-Q Do you mean to say that you do not remember what was the definite proposal that you made to Mr. Putney? A. I could not recall it. I have a knowledge or remembrance that something was said in the course of the different negotiations, perhaps with all of them. I know that I was very anxious to get rid of another long litigation, and I can remember very well what Mr. Kingsley, I think his name was, of the Union College, said.

895 RD-Q. I am trying to find out what you said to Mr. Putney. Do you understand my question? A. Well, Mr. Putney is the attorney for Union Theological Seminary, and I talked with both of them, and I regard what I said to Mr. Kingsley as being said to Mr. Putney, therefore I want to give you the whole of it.

898 RD-Q. What I want is what proposal you made to Mr. Putney? A. I do not suppose there was any proposal made to him that was not made to all the rest.

511

899 RD-Q. Let me see if I can refresh your recollection. Do you remember calling at Mr. Putney's house? A. I do.

900 RD-Q. Do you remember taking with you something in writing? A. I could not say whether I did or not; very likely I did.

901 RD-Q. Can you produce what you took to Mr. Putney's house with you? A. It is possible it is in my copy book if it was in writing; it is not certain; I have not looked for it.

902 RD-Q. Do you remember what you said to Mr. Putney about $200,000 for the lawyers for the colleges? A. I think there was something of that kind said.

512

903 RD-Q. Can you state more about it than that? A. Yes; I think I told him that I thought that inasmuch as the attorneys for the executors had been so abundantly paid and they had done so much more work than they had done for theirs, and theirs was a righteous cause, and the other side was an unrighteous cause, that they ought to be compensated for it. And I said, if I remember right, that I thought Mr. Fayerweather would be better pleased for them to have some of his money than he would to have the parties who tried to steal his money from him; that is about it, if I remember right.

904 RD-Q. Will you swear that any such conversation as you stated in the last answer took place between you and Mr. Putney?

Mr. Sherman: Objected to on the ground that the witness is under oath and has sworn positively, and on the ground that the question is impertinent.

Mr. Parsons: I want to see whether the witness will swear positively.

513

Mr. Sherman: Objected to upon the ground that the counsel, if he is in possession of his ordinary senses, is already aware that the witness has already sworn positively.

905 RD-Q. Answer please. Will you swear positively that there was any such conversation between you and Mr. Putney?

Mr. Sherman: Same objections, and also on the ground that the inquiry relates to the matters at large in the cause and has no relation to the special plea, that it overrules the special plea, and that there is no pleading interposed by these examining defend-
514 ants under which they can take any advantage or benefit from proof if made.

Mr. Parsons: The counsel for the defense say that this is direct cross-examination upon a statement made by the witness when under examination by his own counsel, but in view of the position now taken by the counsel for the complainants that it is irrelevant, they tender again the stipulation which they have so many times tendered to strip this case of matter which is irrelevant to the direct issue by the plea in bar.

Mr. Sherman: Counsel for the complainants, in answer to the tender of the stipulation, inquires whether the

counsel proposing the stipulation means thereby to consent that the testimony appended to the five college judgment roll and the briefs introduced by them, of the counsel for the present complainants when they were counsel in the State court, is intended to be included in the stipulation and thereby removed from the record.

Mr. Parsons: The stipulation which is tendered applies to all testimony irrelevant to the issue created by the plea in bar. The entire record in the five colleges
515 suit and the proceedings in that suit up to the determination of the Court of Appeals are in the view entertained by the counsel for the defence, directly relevant to the plea in bar.

Mr. Sherman: Counsel for the complainants further inquires whether the counsel now tendering the stipulation makes it on behalf of Union Theological Seminary, the Northwestern University and the trustees of Columbia College.

Mr. Parsons: The stipulation is tendered on behalf of all the defendants who have filed pleas in bar.

Mr. Sherman: Counsel for complainants states that he does not agree with counsel for defendants as to the relevancy of the testimony appended to the five college record or the relevancy of the briefs introduced by the
516 defendants or as to the effect of his having introduced those matters in evidence; and inasmuch as counsel does not undertake to tender this stipulation on behalf of any defendants who have answered, the tender thereof is wholly futile, idle and nugatory; and he, therefore, pays no further attention to it.

At the request of the witness, question 905 was repeated by stenographer.

A. Will you repeat the conversation again, Mr. Parsons?

906 RD-Q. I refer to the conversation which you have stated in the preceding answer to have taken place be-

tween you and Mr. Putney, in which you testified that mention was made of the amounts received by the counsel for the executors, &c. I want to find out whether you will state positively that there was any conversation such as that? A. I cannot say as there was on the occasion of my call there at Mr. Putney's house; I cannot say that it was made definitely to Mr. Putney at that time or any other; but that there was such conversation took place during those negotiations I am confident; and that was my position all the way
517 through, and I think I have written to the colleges that I thought they ought to pay, and I was willing to allow $75,000--I do not know that I have written that--if we were made a party to one-third interest—these are only recollections of the conversations that come up at different times—that I was willing that Mr. Root should have $75,000, Putney & Bishop should have $75,000, and my attorney should have $75,000; and I thought it was a very moderate consideration in comparison with what the firm of Arnoux, Ritch & Woodford and John E. Parsons had had; and I am still of the same opinion.

907 RD-Q. State the name of any person as to whom you will positively testify that you had any conversation
518 in which there was mention made of Arnoux, Ritch & Woodford or of John E. Parsons, or of sums paid to them or of any of the other matters as to which you have testified recently that they were the subject of conversation between Mr. Putney and yourself.

A. I will not swear that I did not say to any one of them——

908 RD-Q. I do not ask what you will not swear to. I want to know whether you will swear to any person in respect to whom you will say that there was any such conversation between you and him? A. I believe that all of them have heard those expressions from my mouth, but I will not say that I said it to any particular one.

909 RD-Q. Can you name one? A. I will say it was the subject of general conversation as I was trying to make a settlement. I am not sure whether this was prior to or after the Court of Appeals decision, but it was after the Truax decision.

910 RD-Q. All I want is the name of one person, if you will give it, with whom you will state that you had such a conversation so that he can come here and testify whether there was or was not such a conversation.

519

Mr. Sherman: Objected to on the ground that the purpose avowed for the asking of this question is obviously illegal; that the whole matter is collateral; that nobody would be permitted to testify in contradiction of any answer the witness might make inasmuch as the matter is wholly collateral; as evidence at large in the cause, as overruling the pleas, as being evidence which cannot avail the defendants examining anything, inasmuch as they have not on the record any pleading to which such evidence is responsive or has any relation.

A. I will say that I do not believe that either one of the parties I have mentioned will come here and swear that they did not hear such conversation by me.

520

911 RD-Q. Who are the persons to whom you now refer?

The Witness: Will you read them, Mr. Stenographer?

912 RD-Q. I want you to answer my question, please. Whom are the persons to whom you now refer? A. The attorneys of the several colleges, the five colleges.

913 RD-Q. Mention their names? A. I have mentioned them in my previous answer there and those that you have mentioned.

914 RD-Q. I want you to mention them now, so that as to each one I may inquire whether you will state positively whether you had any such conversation? A. You inquire of any one and you cannot go amiss.

Mr. Sherman: Pardon me, Mr. Reynolds. I instruct the witness when he has once answered the question it is his privilege to decline to answer it again and refer the examining counsel to the record for his answer.

521

The Witness: I thank you for the information and I will adopt the suggestion.

915 RD-Q. Is not what you stated some short time ago about reference to Arnoux, Ritch & Woodford and John E. Parsons, and amounts paid to them, pure and absolute fabrications?

Mr. Sherman: Objected to as grossly insulting, improper in form and substance, and I advise the witness that he is not obliged to take any notice on the record of such a gross departure from every rule of propriety and professional decency; and I ask that the objection be certified to the Court.

522

Mr. Parsons: Do you decline to answer?

Mr. Sherman: I insist that this record be certified to the Court before any answer is taken to this question.

The Examiner: The examiner so certifies.

At this point counsel proceeded before Judge Lacombe.

Judge Lacombe: The only disposition that I will make of the case is to direct the witness that he need not answer that question.

Mr. Parsons: That is, if he is unwilling to answer it?
Judge Lacombe: Yes, unless he wants to.
Mr. Parsons: That is satisfactory to me.

916 RD-Q. The ruling of Judge Lacombe is that you are not compelled to answer the question which I put to you unless you are willing to do so. Are you willing? I will take them under consideration again and see what they are. There is only one unanswered I think, the last one.

523

Question 915 repeated by stenographer.

The Witness: My position is, Mr. Parsons, that Mr. Fayerweather, as he was about to enter the gates of the New Jerusalem fell among thieves; that Ritch and Vaughan were those two thieves, and he fled for refuge to John E. Parsons, and John E. Parsons with others have endeavored to protect the thieves if they could only get some virtuous institutions that would save the honor of the thieves and he could get benefited by giving the money, as he has strived to put it on Mrs. Fayerweather, to an institution specially designed for the benefit of ladies, so he got about one-half of the stolen money

524

given to that institution. Now I call that strictly with all due respect to Mr. Parsons, accessory of a bunco game, and that is just exactly what I regard this situation is.

917 RD-Q. Do you wish to add anything to your answer? A. If it is not clear I will.

Mr. Parsons: We move to strike out the answer upon the ground that it is irresponsive to the question and must be known to the witness to be irresponsive.

The Witness: You asked me, Mr. Parsons, if those questions in regard to Mr. Parsons and the executors were not false. These are my reasons for basing them on what I believe to be the truth. I believe you know the truth just as well as I do, but you are less willing to say so. I believe that is the reason why Evarts, Choate & Beaman would not take the case, for Vaughan and Bulkley when they went there, as Gen. Woodford says, to retain them to probate this will, they could not conscientiously do it. They did all they could
525 for a consideration to aid Mr. Parsons and Mr. Ritch.

918 RD-Q. (Handing paper.) Will you look at the printed paper which is handed to you and which has been marked Complainants' Exhibit 3 for identification, February 5, 1901, and tell us whether that as print, rejecting any pencil or ink or manuscript additions, is a copy of the amended summons and complaint in the suit brought by you, the complaint in which was dismissed for want of prosecution by Judge Lawrence?

Mr. Sherman: Objected to on the ground that it appears upon the face of the paper that the suit is not one brought but revived by this witness. Also as evidence at large in the cause, as not relevant to the pleas
526 of this defendant, and inasmuch as these defendants have filed no pleading to which this proof offered is responsive or under which they can have any benefit therefrom.

A. If I reject the written matter on it I should have to say no.

919 RD-Q. Do you recognize that paper or any part of it?

Mr. Sherman: Same objections.

920 RD-Q. Do you recognize that paper or any part of it? A. The color is familiar to me. I have not read it.

921 RD-Q. Look at it sufficiently to answer the question? A. Yes, I recognize it.

922 RD-Q. What is it?

Mr. Sherman: Same objections and the further objection that it is not re-examination of any matter inquired of on the cross-examination.

A. It is easier to say what it had been than what it is; there have been so many alterations and interlineations, &c., that I should have to study it very carefully to define it.

527

923 RD-Q. My question is addressed to the paper as in print. What is it as in print?

Mr. Sherman: Same objections.

A. Well, I could not answer that, Mr. Parsons, without going through the whole of it.

924 RD-Q. So far as you have gone through it, what is it?

Mr. Sherman: Same objections and the further objection that if it is the purpose of the inquiry to introduce in evidence the paper of which this purports to be a copy, the present mode is incompetent, but this original must be proved.

528

At the request of the witness, Question No. 924 was repeated by stenographer.

A. Well, I have not gone farther than the cover and I should have to go clear through it to say anything more than what is on the cover. I will read it if you want me to, Mr. Parsons.

925 RD-Q. I want you to read it sufficiently to answer my question, and my question is addressed to the paper as appearing in print.

Mr. Sherman: Same objection.

A. In print on the outside it says: "Supreme Court of the State of New York, New York County. John B. Reynolds, as executor, *et als.*, plaintiff, against Thomas G. Ritch *et als.*, defendants. Summons and complaint. William Blaikie, attorney, 206 Broadway, New York. George F. Edmunds, of counsel."

926 RD-Q. Do you mean to be understood that you have not examined that paper sufficiently to know what, as printed, it is. Yes or no, please.

529

Mr. Sherman: Same objection.

A. I do not mean just that thing.

927 RD-Q. Just what thing? A. That I have not examined it sufficiently to determine what it is. I can say what it purports to be on the outside.

928 RD-Q. Have you any impression about what it is as a complete paper as printed?

Mr. Sherman: Objected to as immaterial and incompetent and for all the reasons previously stated.

A. I do not think I have looked at the complaint for many years and I should not want to testify in
530 regard to it without giving it a further investigation; I do not know who has been writing in it, and there is a good part of it stricken out, the purpose of which I know at present nothing. I can imagine. But if you ask me if any part of that has been stricken out I could not answer you. I see there is a good deal of it stricken out. What is left of it I do not know.

929 RD-Q. Was there an amended complaint in the suit that you brought?

Mr. Sherman: Objected to on the ground that if there was, the original is the best evidence.

A. It is my impression that there was.

930 RD-Q. Can't you make a stronger statement, that there was?

Mr. Sherman: Same objection.

A. Well, that particular complaint has been out of my mind so long that I should not like to say so.

931 RD-Q. Well, how can the complaint have been out of your mind when you decline positively to commit yourself to the fact that there was a complaint?

531

Mr. Sherman: Objected to on the ground that the inquiry is wholly frivolous and metaphysical and hypothetical and having no possible value as evidence in any possible aspect of this case, and as evidencing a disposition to obstruct and delay the complainants in the taking of the proofs without even apparent justification therefor.

Mr. Parsons: Answer the question, please.

A. I have only referred to it as a complaint because it is so printed on the outside of it. You have asked me to segregate it mentally, that which has been stricken out, &c., and I cannot do it.

532

932 RD-Q. I recur to my preceding inquiry about any named persons with whom you had any such conversation which you have testified to, into which you introduced the names of Messrs. Arnoux, Ritch & Woodford and John E. Parsons. Will you name any person with whom you will state, under oath, that you had any such conversation?

Mr. Sherman: Objected to as already fully answered.

A. I will state that it was the subject of quite general

conversation between myself and the attorneys representing the colleges at different times.

933 RD-Q. Did you understand my question? A. Yes.

934 RD-Q. Then answer it, please.

Mr. Sherman: Same objection.

A. I have fully answered it before.

935 RD-Q. It asks to commit you to some named person. A. Well, I have given you about twenty of them, and you can summons any of them here, and I do not think that any of them will say that I did not
533 have conversations with them to that effect.

936 RD-Q. I want you to mention one, if you can, with whom you will state that you had such a conversation?

Mr. Sherman: Objected to as evidence at large in the cause, as not relevant to the plea, on the ground that there is no pleading interposed by these defendants under which they can take any advantage of the matters inquired of, as not cross-examination, as already fully answered.

A. I would rather refer to my former answers and leave it there.

534

937 RD-Q. Is that the only answer that you are willing to give? A. Yes.

938 RD-Q. Mr. Reynolds, I think it is fair to you to state that when the paper marked No. 3 for identification was so marked, you did testify that you did verify the complaint, as appears at page 373 of the stenographer's minutes, folio 656 of this record, referring to that page? A. Is there not something more to it, Mr. Parsons?

939 RD-Q. "And I believe it to be true except for

the clerical errors to which you called my attention on the part of my counsel, and I am very glad to state that there are no intentional errors yet on my part discovered in any of them, which is an exception among the attorneys, most of them that I have to deal with in this case." The clerical error referred to was the transposition of the terms plaintiff and defendant. With that exception when you were previously examined you stated that you verified that complaint, as appears, and that you believed it to be true. Now I understand you to say that you do not recognize the paper
535 and that you cannot recognize it without reading it over. Now, have it either way, but let us know what you intend to commit yourself to?

Mr. Sherman: Objected to on the ground that the desire of the witness to commit himself is not a matter of proof; that it is not re-examination; that it appears to be the contention of the examining counsel that the query which he is making has already been fully answered, and he having pointed out in a pretended spirit of fairness to the witness the precise place where he claims that it was previously answered, there is now no occasion to answer it again.

536

Mr. Parsons: We acquiesce; we are perfectly willing to leave the record where it is. If the witness is satisfied, we are satisfied. We offer the paper in evidence.

Mr. Sherman: Defendants object on the ground that it comes from the possession of the defendants, that it has unexplained alterations; that it is garbled; that it does not purport to be a fair copy; that it is obviously matter of record; that the original is obviously appended to the judgment roll of the judgment pointed out by the counsel for the defendants,

whereupon the complaint, if any such there were, was dismissed, and as otherwise incompetent, irrelevant and immaterial, as evidence at large in the cause, and not re-examination.

Mr. Parsons: It is only offered so far as it appears in print.

Mr. Sherman: All the previous objections are renewed, and on the further ground that a garbled copy, the alterations not being explained, is not admissible in any way, shape, manner or form, either in whole
537 or in part.

The paper was marked Defendants' Exhibit No. 3, February 14, 1901, C. B.

Mr. Parsons: That is all. I shall want you to certify this deposition at the end, and particularly the answer which the witness gave to the question as to which Judge Lacombe ruled that he might answer it or might not answer it.

The Examiner: Are there certain questions not answered that you want me to certify?

Mr. Parsons: No, only what I have asked you to certify.

538

Mr. Sherman: I do not understand the application. The Examiner will certify the deposition, of course.

Mr. Parsons: Mr. Sherman, are you willing that Mr. Shields, without the presence of counsel, shall exhibit to Judge Lacombe the answer which the witness gave to that question?

Mr. Sherman: No.

JOHN B. REYNOLDS.

Sworn to before me this 2d day of March, 1901.

JOHN A. SHIELDS,
Examiner.

Deposition of J. Prentiss Browning.

[Put in evidence at folio 991, *infra.*]

IN THE CIRCUIT COURT OF THE UNITED STATES

539

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER *et al.*

AGAINST

THOMAS G. RITCH *et al.*

JOHN B. REYNOLDS, as Executor,

540 AGAINST

THOMAS G. RITCH *et al.*

Equity No. 6675.

Please take notice that on the 26th day of March, 1901, at 11 o'clock A. M., the deposition of J. Prentiss Browning, a material and necessary witness herein on behalf of the defendants, will be taken pursuant to Section 863 of the United States Revised Statutes before P. Finley Henderson, Esq., Notary Public, at Aiken, South Carolina. The taking of said deposition will continue from to-day until completed.

The testimony of said witness will be taken by depo-

sition because said witness lives at a greater distance from the place of trial than one hundred miles.

Please appear and cross examine.

Dated New York, March 21, 1901.

RITCH, WOODFORD, BOVEE & WALLACE,
Solicitors for Defendant Ritch.
Office and P. O. address,
18 Wall St.,
541 Borough of Manhattan,
New York City.

PARSONS, SHEPARD & C[illegible]EN,
Solicitors for Defendants Bulkley and Vaughan,
Office and P. O. address,
111 Broadway,
Borough of Manhattan,
New York City.

To ROGER M. SHERMAN, Esq.,
Solicitor for Complainants
In Original Bill.

To WILLIAM BLAIKIE, Esq.,
Solicitor for Complainant
542
In Cross-Bill.

(Endorsed)—In the Circuit Court of the United States, So. Dist. of N. Y.—Emma S. Fayerweather *et al.* against Thomas G. Ritch *et al.*—John B. Reynolds as Exr. against Thomas G. Ritch *et al.*—Equity No. 6675.—Notice of taking deposition of witness.—Ritch, Woodford, Bovee & Wallace, Attorneys for , 18 Wall St., Borough of Manhattan, New York City.—Copy within received Mar. 21, 1901, Roger M. Sherman, Attorney for Complts. Wm. Blaikie, Solr. for Deft. Reynolds.

JOHN PRENTISS BROWNING.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants,

vs.

THOMAS G. RITCH *et al.*,
543
Defendants.

In Equity.

JOHN B. REYNOLDS, as Executor, &c., of Lucy Fayerweather, deceased,
Complainant,

vs.

THOMAS G. RITCH *et al.*,
Defendants.

544

It is hereby stipulated by and between the counsel for the respective parties that the depositions taken or to be taken in this cause have been or shall be regarded as properly taken under the 67th Rule in Equity when they have been or shall be taken by a stenographer under the direction of the Examiner, Notary or other officer taking the deposition, and when they shall have been written out and signed by the respective witnesses, and that the objection shall not be taken by either party that the depositions must be taken in long hand by the officer taking the deposition.

Dated March 26 1901.

ROGER M. SHERMAN,
Of Counsel for Complts.

C. N. BOVEE, Jr.,
Of Counsel for Defendants.

JOHN PRENTISS BROWNING.

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants,

545 vs.

THOMAS G. RITCH *et al.*,
Defendants.

JOHN B. REYNOLDS, as Executor, &c., of LUCY FAYERWEATHER, deceased,
Complainant,

vs.

THOMAS G. RITCH *et al.*,
Defendants.

In Equity.

546

DEPOSITION OF JOHN PRENTISS BROWNING, a witness, taken at the office of P. Finley Henderson, at Aiken, in the County of Aiken, South Carolina, before Mr. P. Finley Henderson, a Notary Public, duly commissioned and sworn as such in and for said County of Aiken, South Carolina, on the 26th day of March, 1901, in a certain cause above entitled now pending in the United States Circuit Court for the Southern District of New York, wherein Emma S. Fayerweather and Mary W. Achter are complainants, and Thomas G. Ritch *et al.*

are defendants, and a certain other cause pending in the same Court wherein John B. Reynolds, as Executor, &c., of Lucy Fayerweather, deceased, is the complainant, and Thomas G. Ritch *et al.* are defendants.

The complainants appear by their counsel, Roger M. Sherman, and the defendants by their counsel, C. N. Bovee, Jr.

547

JOHN PRENTISS BROWNING, a witness of lawful age, called on behalf of the defendants, and residing in Aiken, in the County of Aiken, and State of South Carolina, more than one hundred miles from the place where this cause is to be tried, being first duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, and being carefully examined says as follows:

DIRECT EXAMINATION by Mr. Bovee:

1 Q. Mr. Browning you are now living at Aiken, S. C.? A. Yes.

548

2 Q. Keeping house here? A. Yes.

3 Q. You are a member of the bar of the State of New York, are you not? A. Yes.

4 Q. When were you admitted to the bar in that State? A. I think it was March, 1892.

5 Q. Were you at one time connected with the law firm of Arnoux, Ritch & Woodford in the City of New York? A. I was a student in their office.

6 Q. Were you connected with that office on the 15th of November, 1890? A. Yes.

7 Q. And had been for how long? A. I entered the office in the fall of 1889.

8 Q. Did you on the 15th day of November, 1890, go to the residence of Daniel B. Fayerweather at 11 East Fifty-seventh street? A. I went there on some day in that fall, I cannot swear that it was the 15th day of November.

9 Q. Who went with you upon that occasion? A. Mr. Grout and Mr. Vaughan.

10 Q. Henry B. Vaughan? A. Henry B. Vaughan.

549

11 Q. And Edward Marshall Grout? A. Edward Marshall Grout.

12 Q. At whose request did you go to the house? A Mr. Grout's.

13 Q. At what time did Mr. Grout tell you that he wished you to go there? A. It was a little before one o'clock at noon.

14 Q. What did Mr. Grout say to you in that connection? A. He said that he wanted me to witness a will, and that I had better go out and get my lunch, because they were going right off, and I usually did not go to lunch until one; so I know it was before one o'clock.

550

15 Q. Did you then go to your lunch? A. I went out and got my lunch.

16 Q. After you had had your lunch and returned to your office, what was done by you? A. Mr. Grout came out of his room with Mr. Vaughan and told me to come along; and we went out and down the elevator and took the elevated up to Mr. Fayerweather's house. I think it was 11 East Fifty-seventh street.

17 Q. What elevated road did you take? A. Third avenue.

18 Q. Getting out at Fifty-ninth street? A. Yes.

19 Q. Proceeding from there to 11 East Fifty-seventh? A. Yes.

20 Q. Do you recall any conversation that took place en route to Mr. Fayerweather's house on that occasion? A. Nothing particular. I think I have a recollection that Mr. Grout explained to me—I had never been a witness to a will—and he explained to me what was necessary, that is, what I would have to do.

551

21 Q. When you arrived at the house of Mr. Fayerweather, where did you and Mr. Grout and Mr. Vaughan go? A. We were admitted to a small reception room on the first floor; I think it was on the left as you went in. You want me to go on?

22 Q. Yes. A. And then Mr. Vaughan left us there—Mr. Grout and myself—in that room, and he went upstairs, and he came down in a few minutes and asked us to go upstairs.

23 Q. Where did you go when you went upstairs? A. We went into the front room on the second floor.

24 Q. Whom did you meet there; whom did you see there? A. There were three women in the room
552 —Mrs. Fayerweather, and Miss Fayerweather who was the witness to the codicil.

25 Q. You don't mean Miss Fayerweather? A. I mean Miss Joyce who was the witness to the codicil, and another woman; I think it was another Miss Joyce.

26 Q. Anner Amelia Joyce?

Objected to as leading.

A. My impression is that she was simply introduced to us as Miss Joyce, and the other Miss Joyce was introduced by her name, because she was younger.

27 Q. Mr. Vaughan was with you at that time, was he? A. He was with us; yes.

28 Q. How long did you remain in that room, Mr. Browning? A. I should not think over a minute or two minutes.

29 Q. From that room where did you go? A. We went into the back room on that floor.

30 Q. In going into the back room how did you proceed, in what order, if you recall? A. I think Miss Joyce went first, I don't remember her name, the one——

553 31 Q. Do you recall if it was Miss Elizabeth R. Joyce? A. I only know that it was the Miss Joyce that was the witness to the codicil.

32 Q. The lady who did precede you in going into the room, afterward signed a paper with you, did she not? A. Yes.

33 Q. Which you describe as the codicil of Mr. Fayerweather? A. Yes, and Mr. Grout went next and I went last.

34 Q. Were they the only persons who went into Mr. Fayerweather's room at that time? A. Yes.

35 Q. When you entered the room did you see Mr. Fayerweather? A. Yes.

36 Q. Was he in or out of bed? A. He was lying in bed.

554

37 Q. What was his position, prostrate or sitting up? A. He was half sitting up, propped up by the pillows; I think he had two pillows, perhaps three pillows, behind him propping him up.

38 Q. What was said, if anything, when you entered the room by any of the party to Mr. Fayerweather? A. Mr. Grout spoke to Mr. Fayerweather, and then introduced me to Mr. Fayerweather, saying that he had come —that he had brought a codicil to be executed, or words to that effect—I am not repeating his exact language

because I don't remember it, and he introduced me to Mr. Fayerweather. Mr. Fayerweather was lying there with his eyes closed when we went in, and he opened them and looked at Mr. Grout, and then after Mr. Grout had greeted him he closed them again, and when Mr. Grout introduced me to him he simply inclined his head a little. Then Mr. Grout told him that he had brought this codicil to be executed, and that he would read it to him, and he drew a chair up to the side of the bed and sat down—I stood at the foot of the bed
555 —and I think Miss Joyce stood rather between Mr. Grout and a window—between the bed and window—and Mr. Grout read the codicil, and the codicil referred to the original will, I think, and he turned to the clause in the will and read that—that was re; ferred to in the codicil.

39 Q. Mr. Grout had with him then the original will and codicils of Mr. Fayerweather on that day, did he?

Objected to as leading.

A. I assume that he did. He read the 10th clause, I think it is, of the will. Whether he read it from the will or from some other paper I do not know.

556

40 Q. Proceed, Mr. Browning, and tell what transpired, in your own way, in connection with the execution of the paper, what was done and what was said? A. After Mr. Grout had finished reading these papers he moved—I think he asked Mr. Fayerweather whether that was the instrument which he wanted to execute and Mr. Fayerweather nodded his head—that is, simply inclined his head, and then Mr. Grout moved his chair away from the bed and Mr. Fayerweather sat up, put his feet out of bed and sat on the edge of the bed, and I think Miss Joyce went into the other room after a pen and ink. I do not think there was a pen and ink in the

room, and I think she went in there at that time and brought a pen and ink. She handed the pen to Mr. Grout and he handed it to Mr. Fayerweather, who was sitting on the edge of the bed, and he handed him the paper with the signature toward him—I mean so that he could sign it—and I think he pointed to the seal and showed him—that is, he had his finger on the seal, and showed him where to sign.

Mr. Sherman:

557

41 Q. Who had his finger on the seal? A. I mean he had his finger on the place where Mr. Fayerweather was to sign.

42 Q. On the seal? A. I mean opposite the seal, because he was to sign opposite the seal. And Mr. Fayerweather then signed his name.

Mr. Bovee:

43 Q. When Mr. Fayerweather raised himself up and swung his legs out of the bed in the way that you have described, did he receive any assistance from either of the persons in the room? A. None.

558

44 Q. Was the signature appended to the paper by Mr. Fayerweather his unassisted act, or did he receive any assistance in writing his name from any of the parties? A. He received no assistance.

45 Q. Was his hand held at all, or supported at all, by Mr. Grout, or by you or Miss Joyce? A. It was not.

46 Q. After Mr. Fayerweather had signed this paper, what questions, if any, did Mr. Grout propound to him

in respect to the paper? Wait a moment. The question is withdrawn.

47 Q. After Mr. Fayerweather had signed the paper, what did Mr. Grout do? A. Mr. Grout took the paper from him and read to him the attestation clause at the end of the codicil, and my impression is that he asked him each question as they appear in the clause.

48 Q. Did he ask him if he published and declared that paper to be a codicil to his last will and testament?

Objected to as leading.

559

49 Q. What did he ask him in respect to the paper?

Counsel for defendants hands to the witness a paper marked Complainants' Exhibit No. 5 of January 24th, 1901, and endorsed the 4th codicil to the last will of Daniel B. Fayerweather.

Counsel for the complainants inquires of the examining counsel whether the paper is the original codicil and whether he has taken it from the file of the Surrogate's office and brought it out of the jurisdiction of the Surrogate's Court to South Carolina.

Counsel for the defendants answers counsel for the complainants that he hands the witness the original 4th codicil to the will of Daniel B. Fayerweather.

560

Counsel for the complainants objects to the use of this paper on the ground that it appears that it has been unlawfully taken from the files of the Surrogate's office and taken out of the jurisdiction of the Surrogate's Court in the County of New York, out of the jurisdiction of the State of New York to the State of South Carolina, in the custody of the defendants' counsel, for which there can be no

authority of law, and that the illegal possession of it under the circumstances impugns its value and use as evidence.

Counsel for the defendants states that the original will and codicils of Daniel B. Fayerweather have been duly admitted to probate in the office of the Surrogate in the County of New York, a tribunal having jurisdiction, and that the paper is now produced by counsel for the executors of Daniel B.
561 Fayerweather; and the will and codicils having been admitted to probate, they have a right to the custody of same.

Counsel for the complainants disputes the proposition that there is any authority of law for the presence of the original codicil in the State of South Carolina.

A. My recollection is that Mr. Grout asked Mr. Fayerweather separately whether this was a codicil to his last will and testament, and whether he had signed it, sealed it, published it and declared it, and whether he wished us to sign it as witnesses, and Mr. Fayerweather simply signified his assent by an inclination of the head.

562

Counsel for the complainants asks the notary to certify that during the last answer the witness held in his hand and appeared to be perusing the paper handed him by Mr. Bovee.

The notary so certifies.

Witness: For the purpose of getting the legal expression which I am not well up on.

50 Q. Was that paper then signed by any of the parties then present, and if so, by whom, and in what or-

der? A. The paper was then signed by the witnesses. Miss Joyce, myself, and Mr. Grout, in that order.

51 Q. Won't you give Miss Joyce's name in full? A. Miss Elizabeth R. Joyce.

52 Q. Was the signatures of the three parties, Miss Joyce, yourself and Mr. Grout signed at that time in the presence of Mr. Fayerweather? A. They were.

53 Q. And in the presence of each other? A. Yes.

54 Q. The three witnesses remained in the room throughout the entire transaction, did they not, Mr. Browning? A. Yes, except, I think, Miss Joyce
563 went into the front room to get the pen and ink.

55 Q. That was before Mr. Fayerweather signed, of course? A. Before he signed the will.

56 Q. Now, are you able to say, Mr. Browning, whether you used the same pen as Miss Joyce? A. I think I did.

57 Q. And what is your recollection in respect to the pen used by Mr. Fayerweather in signing his name? A. I think he used the same pen that Miss Joyce and I used.

58 Q. How about Mr. Grout? A. I do not know as to that; my recollection is that I took the pen after Miss Joyce had signed, and sat down in the chair that she had been sitting in when she signed, and that
564 that was the pen that she had brought in from the other room for Mr. Fayerweather, and there was only one pen there.

59 Q. Is the paper which I now show you, dated the 15th day of November, 1890, and endorsed "4th Codicil to the last will of Daniel B. Fayerweather, dated November 15, 1890," and marked Complainants' Exhibit No. 5, January 24th, 1901, the paper which was at that time signed by Daniel B. Fayerweather and by Miss Joyce, yourself and Mr. Grout? (Handing paper to witness). A. Yes.

Counsel for the complainant admits that the paper just referred to is what purports to be the original codicil of Mr. Fayerweather dated November 15, 1890, and which has already been marked at the instance of the complainants' Exhibit No. 5, January 24, 1901.

60 Q. After Mr. Fayerweather had signed the paper did he change his position back into the bed? A. He drew his feet into the bed and lay back against the pillows.

565

61 Q. Resumed his former position? A. Very nearly, substantially.

62 Q. In doing so was he assisted by any one in the room? A. He was not.

63 Q. Or was it suggested to him that he should return to his former position in the bed at all? A. No.

64 Q. When he swung his limbs out of the bed in the way that you have testified had that been suggested to him by any other person in the room?

Objected to, as the witness has not testified that he swung his limbs out of the bed.

566

A. It had not.

65 Q. And I think you said that he was not assisted at all? A. He was not assisted.

66 Q. Mr. Grout—Mr. Browning, was Mr. Fayerweather under any restraint while he was executing that paper?

Objected to as calling for a conclusion.

67 Q. What is the answer? A. None that I observed.

68 Q. What would you say as to his competency? A. What do you mean by competency?

69 Q. Mental and physical competency to execute the paper? A. To execute the paper—why I think he was competent to execute the paper.

70 Q. What would you say as to his understanding of the paper which he signed? A. He appeared to understand fully what was being done.

71 Q. What would you say as to his—the soundness of his mind as you observed it at that time? A.
567 Well, all I can say is from his actions—he acted as a perfectly rational man would act under the circumstances.

72 Q. After the paper had been signed by Mr. Fayerweather and by the subscribing witnesses, what then occurred—where did you go? A. We all went into the front room.

73 Q. Who? A. Miss Joyce, Mr. Grout and myself.

74 Q. Leaving Mr. Fayerweather in the bed? A. Yes.

75 Q. How long did you remain in the front room—whom did you see in the front room when you returned there? A. I think the same persons were there that were there when we left it.

76 Q. That is Mrs. Fayerweather—Mrs. Lucy Fayerweather? A. Mrs. Fayerweather and the older Miss Joyce and Mr. Vaughan.

568

77 Q. Was there a passage communicating with the room in which Mr. Fayerweather was and this front room? A. Yes.

78 Q. Did Mr. Vaughan come into Mr. Fayerweather's room while this paper was being read and executed? A. No.

79 Q. Was anybody in the room other than Mr. Fayerweather and the three witnesses? A. No one that I saw.

80 Q. How long did you remain in the front room after your return? A. Why I cannot recollect that I remained there at all; I think I went right out.

81 Q. Returned down town? A. Yes.

82 Q. Leaving Mr. Grout and Mr. Vaughan there? A. I think so; I have not any recollection of anything occurring in the front room after I went in there.

Mr. Bovee: You may cross examine.

CROSS-EXAMINATION by Mr. Sherman:

1 Q. Mr. Browning is your residence in Aiken permanent? A. I reside here in the winter.

569

2 Q. What period do you call the winter? A. From December—early in December—until April, around the 20th of April.

3 Q. Where do live the rest of the year? A. I have no residence.

4 Q. Where did you spend the rest of last year out of those months? A. I spent a portion of it in New York.

5 Q. What portion? A. I left here last year about the 19th of April and I stayed in New York until the 1st of June, I think.

6 Q. New York City, do you mean? A. New York City. And then I went to Cooperstown, New
570 York, and I stayed there until some time in November, and then I went back to New York and stayed there until I came down here about the 13th of December. I think it was, 12th.

7 Q. That describes your disposition of the time for how many years last past? A. Only the last year or two; I resided in New York until a year ago last fall.

8 Q. New York City? A. New York City.

9 Q. This suit was commenced in June, 1897, how much of the time since then have you lived in New York City? A. I lived there right along. I spent three or four months away every summer, but, except for that, I lived there right along until a year ago last fall.

10 Q. How long is it since you have voted?

Objected to as irrelevant and immaterial, the statute being complied with when the witness lives in a place one hundred miles distant from the place of trial.

A. I voted last fall.

11 Q. Where? A. Cooperstown.

12 Q. Had you voted there previously? A. Never.

571

13 Q. Where did you vote last before that? A. New York City.

14 Q. When? A. I think the fall before that.

15 Q. Had you been accustomed to vote in New York City before that? A. Yes.

16 Q. You never voted in South Carolina? A. Never.

17 Q. Is it not true that you are temporarily in Aiken for reasons connected with your health? A. Well, I expect to come to Aiken every winter for my health.

18 Q. For reasons connected with your health? A. Yes.

19 Q. When were you last in New York for any lengthy period—when was that? A. What do

572 you call a lengthy period?

20 Q. Well, whatever you consider a lengthy period—call five months—three or four months? A. I was there six weeks last spring.

21 Q. And before that? A. Before that I had not been there until the fall before.

22 Q. And prior to that had you been engaged in any business? A. Yes.

23 Q. What business—practicing law? A. No, I was a broker for the last—well about the last six months I was in New York.

24 Q. Do you mean you was a member of the Stock Exchange? A. No, but I was in a firm that was a member of the Stock Exchange.

25 Q. Did you ever actively practice law? A. Yes.

26 Q. For what period? A. From the time I was admitted in 1892 until two years ago.

27 Q. Alone or in some firm? A. Alone. I was secretary for Judge Bookstaver for six years, and I had my office during that time and afterwards when I went out.

573

28 Q. You were not with any firm? A. Not after I went with him. I was managing clerk for a firm for a while before that.

29 Q. What firm? A. Man & Protheroe.

30 Q. At the time of this occurrence in 1890 how long had you studied law? A. I had been in that office for a year.

31 Q. Did you attend any law school? A. No.

32 Q. You had not studied law except as you had studied it in the office of Arnoux, Ritch & Woodford? And you were not admitted to the bar until the spring of 1892? A. I had to serve two years in an office as I did not go to a law school.

574

33 Q. I think you said you had never been present at the execution of a will prior to the 15th of November, 1890? A. I think not—or whatever the date is.

34 Q. You do not mean that—that literally means you did not say so? A. I think that answers it. I think I answered that I had never been present.

35 Q. I observe that you found it necessary in order to recapitulate the questions which Mr. Grout asked Mr. Fayerweather to use the attestation clause of that codicil? A. I simply did that as a matter of convenience.

36 Q. You rely, then, rather upon reasoning from the form of the codicil before you than because you have a distinct recollection, independent of the codicil, as to what Mr. Grout said to Mr. Fayerweather? A. I distinctly remember that Mr. Grout either read that attestation clause or that he asked him every question, because I was impressed by the care which Mr. Grout exercised, it being my first experience of that sort?

Counsel for the complainant moves to strike out the answer beginning with the word "because", as not responsive.

575

37 Q. When did you first speak with anyone on the subject of your giving this present deposition? A. The first I heard of it I had a letter from my mother saying that either the firm of Ritch, Woodford, Bovee & Wallace or Gen. Woodford had written her for my address in Aiken, and asking her whether I was well enough to go to New York to give my testimony.

38 Q. You have not yet said when that was? A. I think that was about five or six weeks ago.

39 Q. Had you previously had any conversation with anyone on the subject of this pending suit? A. This suit?

576

40 Q. Yes? A. No.

41. Q. Did you know that this suit was pending previous to that letter? A. I may have seen it in the papers.

42 Q. You say you may have, well did you? A. I don't know. I have seen so many suits in this connection that I could not distinguish.

43 Q. You never had any conversation with anyone on the subject of this suit? A. No, except with Mr. Bovee since he has been down here.

43½ Q. How recently? A. Well, I think Mr. Bovee was here about ten days ago.

44 Q. Was that the first occasion when you talked with anyone on the subject of this suit? A. Yes.

45 Q. That answer covers the period back to June, 1897? A. It does.

46 Q. Have you ever been in the office of Arnoux, Ritch & Woodford or of Ritch, Woodford, Bovee & Wallace since June, 1897, until now? A. I
577 think not.

47 Q. How long a conference did Mr. Bovee have with you about ten days ago here at Aiken? A. I should think we talked together an hour or an hour and a half in the morning, and perhaps for a few minutes after lunch in the afternoon, twenty minutes.

48 Q. And then again yesterday? A. I saw Mr. Bovee last evening for perhaps half an hour.

49 Q. You talked with him about this deposition? A. Yes, generally.

50 Q. Did you see or did Mr. Bovee read to you on either of these occasions the deposition given by
578 Mr. Grout in the proceedings for the probate of the will or codicil, or either of them, in the Surrogate's Court for the County of New York? A. He read some portions.

51 Q. Did you read any portion of it? A. Not except to glance at it.

52 Q. Did you have the printed book? A. I did not have the book in my hand.

53 Q. Did you see it in his hands? A. Yes, as he may have pointed to some question or answer I may have looked at that.

54 Q. You did not look at it otherwise? A. No.

55 Q. The book is a large book. Perhaps that is it

behind Mr. Bovee on the floor. Will you look to see if it is? A. It was the book of testimony, taken before the Surrogate.

56 Q. Is that the book on the floor behind Mr. Bovee? Will you give yourself the trouble to look at it? A. I think that is the book.

Counsel for the defendants admits that the book which Mr. Browning now holds in his hand is the book referred to by him from which Mr. Bovee read to the witness, and which is a copy of the record in
579 the Surrogate's Court.

57 Q. Did Mr. Bovee read to you the whole of the deposition of Edward Marshall Grout? A. I think not—I think only portions.

58 Q. And were those portions that he read you such as he selected, or those which you indicated you would desire to hear? A. I think he read all portions in which Mr. Grout's testimony bore upon anything in which I acted, or where I was present.

59 Q. Well, if you saw nothing else, will you explain how you are able to say that what you did see included all that bore upon your testimony? A. I did not say upon my testimony.

580

60 Q. Then please explain how you were able to judge that what you did see or what was read to you was all in the deposition which bore upon anything in which you acted or where you were present? A. I said that I thought he read all those portions. I heard Mr. Grout's testimony before the Surrogate, and I still think that he read all the portions, for that reason.

61 Q. How long ago was it that you heard Mr. Grout's testimony before the Surrogate? A. When it was taken.

62 Q. How long ago? A. It must have been 1891.

63 Q. Ten years ago? A. Ten years ago.

64 Q. You mean to say that you have a distinct recollection of it after this lapse of time? A. I have.

65 Q. Were you present at any time when Mr. William Henry Arnoux rehearsed the witnesses' testimony, or drilled the witnesses, in anticipation of their testimony being given in the Surrogate's Court? A. I think not.

66 Q. You have no recollection of any such occurrence? A. No.

581

67 Q. Judge Arnoux testified in a proceeding before Scott Lord in substance this, that in anticipation of the contest in the Surrogate's Court that he had all the witnesses—attesting witnesses—to the will and the various codicils before him, that he drilled them, that he rehearsed their testimony, that he put himself in the attitude of a hostile or cross-examining counsel and endeavored to anticipate and apprise the witnesses of what they had to meet in that respect, and that the success of the proceedings before the Surrogate, especially in the case of Mr. Grout, was the result largely of his drilling upon that occasion. Were you present at any such performance as that?

582

Counsel for the defendants objects to the question as improper in form and incompetent, assuming facts which have not been proven.

A. I was not.

68 Q. Did you have any conversation with Mr. Arnoux prior to your going on the stand in the Surrogate's Court as to what your testimony should be? A. I did not.

69 Q. Were you present at any interview between Mr. Arnoux and Mr. Grout at which any such discussion

took place in reference to Mr. Grout's testimony, when it was to be given? A. I was not.

70 Q. Then if Judge Arnoux includes you in any such statement he is mistaken, is he? A. I think he must be.

71 Q. Cannot you make it more positive than that? A. I have great respect for Judge Arnoux, and if he said that I should dislike to contradict him, but still I have no recollection of any such occurrence.

583 72 Q. Do you mean to imply that Judge Arnoux may have gone through such a performance and that you may have been unconscious of the purpose, or tendency of it? A. I have never been unconscious, except when I am asleep.

73 Q. I do not refer to that absolute result and lack of conscious cerebration which you appear to refer to. I mean to ask you whether some interview may have taken place between you and Mr. Arnoux in which he may have endeavored to drill you as a witness, but at which you were not conscious that you were being so drilled? A. That could not have happened.

74 Q. Are you as certain of the fact that Mr. Grout signed his name as an attesting witness to the codicil of November 15, 1890, in your presence and in the presence of Mr. Fayerweather as you are certain of
584 any fact that you have testified here to-day? A. I am.

75 Q. You have a distinct recollection of that as a fact, have you? A. I have and I recognize his handwriting.

Counsel for complainants moves to strike out the answer commencing with "and I recognize" as not responsive.

76 Q. You say Mr. Grout signed his name as a witness in the same room in which Mr. Fayerweather signed his name, and you remember that distinctly as a fact? A. I do.

77 Q. What did you do with the pen with which you signed your name as a witness when you had signed? A. I have no distinct recollection. I assume that I put it on the table. I sat at a table.

78 Q. You signed at a table? A. At a table.

79 Q. Describe the table. A. I think it was a table about four feet in diameter, and whether it was square or round I cannot say.

80 Q. If it were not round, what do you mean
585 by the diameter? A. I mean from one side to the other, not from one corner to the other.

81 Q. Do you mean that it was either a circular table of four feet in diameter or that it was a square table? A. Yes, it may not have been as large as that. I have not any distinct recollection. The table stood by the window and was moved from the window over near the bed.

82 Q. How near was the side of the bed that was nearest to the window to the window? A. I should say about six feet, it might be seven.

83 Q. And where was the head of the bed on which Mr. Fayerweather lay? A. The head of the bed was against a wall, and the window was on the right.

84 Q. The east wall of the house? A. East wall.

586

85 Q. And you are quite positive that there was at the window on the right of Mr. Fayerweather as he lay when you entered his room on that occasion a table which was either round or square and was about four feet in diameter? A. I am positive that there was a table there. I am not at all positive as to the size of it.

86 Q. What other furniture was there in the room when you arrived? A. I think there was a bureau between the windows, and some chairs.

87 Q. Were there two windows in the room? A. I think there were.

88 Q. Have you any positive recollection that there were? A. No more so—I would not like to swear it.

89 Q. Your memory is dim on that point, is it? A. I do not recollect another window. I presume that—I think there was, as most New York houses are built in that way.

90 Q. As a matter of memory, you have no memory on that subject, have you? A. Not sufficient to swear to.

587

91 Q. Do you wish to be understood that all three witnesses to the codicil on that occasion were grouped in a space between the right hand side of Mr. Fayerweather's bed—right hand with reference to him as he lay in the bed, and the window to his right and the bureau—that they were all grouped in that space? A. I stood at the foot of the bed until I went forward to sign my name—or—yes, I think——

92 Q. Well, what do you think? A. I think that is so.

93 Q. And while you were standing at the foot of the bed, where was Miss Elizabeth R. Joyce? A. She stood in no particular spot, but between the—where I was at the foot of the bed and the window; that is ——

588

94 Q. When you say she stood in no particular spot do you mean that your memory as to the particular spot where she stood is not definite? A. I mean that I recollect that she moved around.

95 Q. Prior to the time when you signed? A. Yes, I think she helped Mr. Grout move the table forward and went and got the pen.

96 Q. And while the table was being moved forward you were not in that space, but at the foot of the bed, were you? A. Yes.

97 Q. And you are positive that there was a table in that space during that proceeding as you are of any other fact you have testified to, are you? A. I am.

98 Q. Were the windows of Mr. Fayerweather's room opened or closed when you went in? A. I do not know.

99 Q. Did Mr. Grout sign his name to the codicil while it was resting on that table? A. I think he sat in the chair where we had each sat, and signed his name.

589

100 Q. Have you a distinct recollection of that? A. I recollect that he signed his name at that table.

101 Q. And before leaving the room? A. Before leaving the room.

102 Q. You have a distinct recollection before leaving the room of seeing Mr. Grout's name as a witness written on that codicil, have you? A. I have.

103 Q. At the time—at and prior to the 15th of November, 1890, what were your duties in the office of Arnoux, Ritch & Woodford? A. Law student.

104 Q. Well, did you perform any services for the firm? A. I did what I was told.

590

105 Q. Well, I ask you what was the nature of the things you were told to do for about that period? A. I used to go up to Court and answer calendars, prepare subpœnas, and other papers of insignificant importance.

106 Q. Do you remember any particular case that you had anything to do with in that week prior to November 15, 1890? A. No, sir.

107 Q. Do you remember any legal business of any kind that you can recall as having occurred during that week with which you had anything to do? A. No.

108 Q. Or for a month prior to that date? A. Not by name; don't remember any case by title.

110 Q. Or any transaction by the nature of it in the six months before that date? A. I remember at that time I did quite a good deal of preparing schedules and accounts.

111 Q. In reference to this estate? A. No, this was before anything of that sort was done.

112 Q. Under whose direction did you render such services as you did render in the business of the
591 firm for the month, say prior to November 15, 1890? A. I think from the time I entered the office I was under Mr. Grout's direction.

113 Q. Was he then the managing clerk of the office? A. No.

114 Q. Who was? A. David F. Butcher.

115 Q. Did you have a desk in the general clerk's room, or did you have a room by yourself at that time? A. I think I had a desk in the outside office.

116 Q. Where was Mr. Grout's room then in reference to Mr. Woodford's and in reference to Mr. Ritch's? A. Mr. Grout's room was next to Mr. Woodford's and across the office from Mr. Ritch's.

117 Q. Was Mr. Grout then engaged in the preparation of cases for trial? A. He was what they
592 called the general service clerk.

118 Q. Well, what service was comprehended within that term? A. Well, I think preparing wills was one.

119. Q. What makes you think that, do you recall any other will that he prepared? A. No, I have a general idea that that was part of his duty.

120 Q. You have no specific knowledge on the subject? A I have no knowledge of what he did at all except as I saw him going back and forth in the office.

121 Q. And what he told you to do was purely mechanical, not involving any decision on your part as to

whether you should do one thing or the other? A. Not in the least—purely mechanical.

122 Q. Had you ever, at that time, been in any Surrogate's Court during the progress of any contest of any testamentary paper? A. I think not.

123 Q. Had your reading, up to that time, involved the study of any questions of wills? A. I think I had studied the preparation of wills.

124 Q. Do you mean from the form books or from some treatise? A. From some treatise and the
593 form books.

125 Q. Do you recall any treatise that you had studied up to that time? A. Blackstone.

126 Q. That is hardly confined to wills? A. Decidedly general.

127 Q. Do you recall any treatise on the subject of wills exclusively which you had studied at that time? A. I don't think I had studied any exclusively on wills at that time.

128 Q. I did not ask as to your having studied them exclusively? A. I mean I do not think I studied any book which was given up to the subject of wills at that time.

129 Q. I suppose your mind on the subject of
594 what was essential to establish a will was to use a common expression fairly, a blank page, was it not? A. I think it was.

130 Q. The writing was all to come? A. Except that I know that I was acquainted with the wording of the attestation clause of the will, which I had studied when I first entered the office.

131 Q. Had you occasion to copy the attestation clause in the office? A. I think not; I never did any copying.

132 Q. What occasion had you to read it? A. I think that that was one of the first things that I looked up when I started in.

133 Q. Just as a matter of amusement or for some specific purpose? A. I studied on my own hook, when they did not want me to work.

134 Q. You don't remember whether Mr. Grout used the same pen to sign the codicil that you used to sign yourself? A. No.

135 Q. You did not see him produce any pen from his pocket, did you? A. I have no recollection.

136 Q. Who was it who first asked for a pen and ink on that occasion? A. I think Mr. Grout asked
595 Miss Joyce.

137 Q. What did he say to her? A. I think he simply asked her whether there was a pen and ink there.

138 Q. What did she say to him? A. I do not know that she said anything.

139 Q. But she went and got a pen and ink, did she? A. My impression is that she went into the front room and got them.

140 Q. And you all waited for her to return before any ink was put to paper; is that right? A. Yes, sir.

141 Q. Did it take very long? A. Only a moment.

142 Q. As soon as this signing was over you immediately left the room? A. Yes, sir.

596

143 Q. Who went out first—you, Miss Joyce or Mr. Grout? A. I could not say; we all went out together.

144 Q. You did not form a line of three and march out evenly, did you? The passage did not admit of that, did it? A. No, but we went so nearly together that I have no recollection of any one going before the other.

145 Q. You were so close together that you cannot in your recollection distinguish which went first; is that so? A. No, I merely mean that we went out together

—we went so close together—I presume one followed the other, but I do not know the order.

146 Q. Did you immediately leave the house? A. I think I did.

147 Q. Did Mr. Grout go with you? A. I think not.

148 Q. Are you positive? A. I am fairly positive.

149 Q. Are you as certain of that as you are of anything else you have testified to? A. I am not.

150 Q. You will not be positive that Mr. Grout did not leave the house with you; is that what you mean?

597

A. I cannot be positive that he did.

151 Q. And you will not be positive that he did not? A. I think that might follow.

152 Q. Seems to follow, do you adopt it? A. Yes, I adopt it.

153 Q. There is nothing the matter with your mental operations as far as you know, Mr. Browning? A. Not as far as I know. I would not like to tell if I did know.

154 Q. Did you see much of Mr. Ritch for a week before this? A. I never saw Mr. Ritch very much.

155 Q. Did he seclude himself in his room? A. Very largely.

598

156 Q. Did you ever go into his room? A. Once in perhaps two or three weeks to take him a letter or tell him that someone called to see him.

157 Q. Never unless you were sent for or required to go by some specific errand? A. I am not sure that I was ever sent for by him.

158 Q. Was Mr. Woodford more accessible in your case than Mr. Ritch? A. Very little.

159 Q. You entered the office as a student, I suppose,

because of some previous acquaintance there? A. My mother was acquainted with General Woodford.

160 Q. And Gen. Woodford was the procuring cause of your being there at that time? A. Yes.

161 Q. About what time did Mr. Ritch customarily arrive at the office in the morning during that period? A. I cannot say during that period. I can tell you what time he usually arrived there.

162 Q. Yes, well when? A. I think between nine and half-past—quite early.

599

163 Q. Did he remain in the office all day usually? A. As a rule.

164 Q. Did he go out to lunch? A. I think he did.

165 Q. When did he usually go out to lunch and for how long? A. I do not know, because I was usually out to lunch myself from one to two.

166 Q. Is the inference that he was out at the same time you were? A. I have no recollection of ever having timed Mr. Ritch.

167 Q. It is not a question of stop watch, give it as near as your memory will serve? A. I have no distinct recollection of Mr. Ritch's comings and goings to lunch.

600

168 Q. Did he usually go out in the middle of the day or about then? A. My impression is about one o'clock.

169 Q. And how late in the afternoon did he usually stay in the office? A. He stayed quite late; until five.

170 Q. Did you ever meet Mr. Fayerweather before this occasion when you saw him in his bed? A. No.

171 Q. When did you first hear of him? A. I don't know as I had ever heard of him before that day.

172 Q. Did Mr. Grout tell you that it was Mr. Fay-

erweather's codicil that you were to witness? A. He did not when he came out, first; he may have on the way up there.

173 Q. Who first mentioned to you the name of Mr. Fayerweather in connection with the codicil? A. I presume it was Mr. Grout.

174 Q. When you say you presume, do you mean that as a matter of recollection or reasoning? A. As a matter of reasoning.

175 Q. You have no recollection? A. No.

601

176 Q. Are you positive that Mr. Woodford did not speak to you about it? A. I am.

177 Q. Are you positive that Mr. Ritch did not? A. I am.

178 Q. Did Mr. Vaughan go downstairs with you after you left Mr. Fayerweather's room and conduct you to the front door? A. I have no recollection that he did.

179 Q. Did you go down to the front door and go out without any one accompanying you? A. I have no recollection of doing that. I have no recollection of going out of the house at all.

602

180 Q. You know that you got out, you are not there now? A. I am here, that is all I know.

181 Q. Now, seriously, cannot you give us your best recollection as to the manner in which you were conducted out of the house? A. I cannot recollect anything from the time we went into the front room as to how I left that house or who went with me, whether anybody went with me.

182 Q. In the houses to which you have been accustomed to go, Mr. Browning, has it not been your exper-

lence that the courtesy is accorded you of accompanying you to the door when you leave by somebody?

Objected to as irrelevant, immaterial and incompetent.

A. Not necessarily.

183 Q. Is not it customary in your experience? A. No, I think not.

603

184 Q. Well, where you are not on intimate terms, I mean with the household? A. I should not expect it as much in that case as where I was.

185 Q. You mean to say that when you visit strangers' houses that you are usually left to find yourself out by yourself? A. That is my experience.

186 Q. And is it that circumstance which renders you unable to recall whether or not somebody saw you to the door on this occasion? A. I cannot say as to that.

187 Q. There is nothing in that circumstance out of keeping with your ordinary experience in such cases, is that so? A. That is so. Different grades of society have different customs.

604

188 Q. Have they indeed? Let us see, will you describe as accurately as you can that grade of society which, according to your experience, permits visitors to to go unaccompanied to the front door upon their taking leave, and then, if you please, describe that grade of society which, according to your experience, is accustomed to extend that courtesy to visitors?

Objected to as immaterial.

A. I know one grade of society where it is customary

when a visitor leaves for a servant to accompany them to the door, open the door, and see them out, and there is usually a servant around whose business it is to do that and practically nothing else. I know of other grades of society where the servants are not as abundant as in the one I have just spoken of, and if perhaps the acquaintance is not very close the host is very apt to accompany the visitor to the door. If the acquaintance is close the visitor will often find his way to the door, especially if he has been there before. I
605 think there is a long list to go through.

189 Q. Well, if you are satisfied, I am. A. All right.

190 Q. Who let you in, a colored butler? A. I don't remember.

191 Q. Did you go in by ringing the bell and having somebody open the door? A. I think we did.

192 Q. Do you remember whether colored butler when you entered showed you into a reception room on the main floor? A. No.

193 Q. Don't remember, or was there no such occurrence, which do you mean? A. I don't remember. I remember going into the reception room, but don't remember who the servant was.

606

194 Q. You remember that there was a servant? A. Not sufficiently to swear to it.

195 Q. Mr. Vaughan did not use his latch key in getting into the house, did he? A. Not that I remember.

196 Q. Is your memory not clear? A. I don't remember his using any key. My recollection is that he rang the bell and somebody admitted us.

197 Q. You are not prepared to swear that Mr. Vaughan did not accompany you and Mr. Grout down

to the front door and open it for you and close it for you? A. I am not.

198 Q. Did Mr. Grout tell you anything about the contents of these papers or any of them before you entered Mr. Fayerweather's room? A. No.

199 Q. Did Mr. Vaughan? A. No.

200 Q. Did you hear Mr. Vaughan saying anything to Mr. Grout or Mr. Grout saying anything to Mr. Vaughan on that subject? A. No.

607

201 Q. What occurred while you were going uptown—took about half an hour, did it not? A. About that.

202 Q. Did you talk about the errand you were going? A. Mr. Vaughan and Mr. Grout talked together, I think.

203 Q. Did you hear what they said? A. No.

204 Q. How many times in your life have you seen Mrs. Anner Amelia Joyce, who is now Mrs. Reynolds? A. Two or three times.

206 Q. Not more than three? A. I think not more than three.

608

207 Q. Where? A. I think I saw her there at the house on that day.

208 Q. Well? A. I think I saw her in the Surrogate's Clerk's office when the will was offered for probate, and I think I saw her one day in court during the contest.

209 Q. Do you remember the occasion of her being in the Surrogate's Clerk's office when the papers were made out—the preliminary paper? A. No, I do not recollect whether she was or not.

210 Q. She was not an attesting witness, was she? A. No.

211 Q. Was there any occasion that you know of for her being there? A. No.

212 Q. Do you know Miss Beardsley, that is a maiden lady of mature years, I believe? A. I know her name.

213 Q. Do you know the lady—did you ever see her? A. Not to know her.

214 Q. Are you as positive of that as you are of anything else you have testified to here? A. No; I have no positive recollection of ever seeing her.

609

215 Q. Have you a positive recollection that you never have seen her? A. No.

216 Q. Mrs. Reynolds, then Miss Anner Amelia Joyce, has testified that she was not in the second story front room when you and Mr. Grout arrived, and that she did not know that you were in the house until she saw you leaving the house accompanied by Mr. Grout and Mr. Vaughan conducting you downstairs. Is your recollection of seeing Miss Anner Amelia Joyce in the front room prior to your going into Mr. Fayerweather's room on that occasion so distinct that you are prepared to contradict her on that point?

Objected to as incompetent, assuming testimony to have been given which was not proven.

610

A. My recollection is that I met Miss Joyce in the front room when I went in.

217 Q. My present question is whether your present recollection is so distinct that you depose that she does not tell the truth when she says she was not there?

Objected to as incompetent.

A. My recollection is as I have stated. I cannot characterize Miss Joyce testimony.

218 Q. How long were you in the same room with her on that occasion? A. I should think not over a minute.

219 Q. Did she say anything to you? A. I think not.

220 Q. Did you hear the sound of her voice? A. I could not say.

221 Q. Did you address any words to her? A. I did not.

222 Q. Did she hear the sound of your voice? A. I think not.

611

223 Q. Was there anything in particular in the circumstance of her being there to fix that fact in your memory? A. The fact that she was there.

224 Q. That is all, is it not? A. Yes.

225 Q. There was no circumstance or relation to other events, or significance about it, tending to impress the fact of her being there upon your mind, was there? A. I think the fact that the will was contested shortly afterward has made me recollect most of the facts in connection with the matter—that I do recollect.

226 Q. Is that the best answer you can give to the last question? A. That is.

612

227 Q. Is it the most intelligent explanation you can give as to the circumstance of her being in the room being impressed on your memory? A. I think it covers the whole subject.

228 Q. Was any allusion made to the fact of her being there or to the necessity of testifying that she was there at any interview between you and Judge Arnoux, or between Judge Arnoux and Mr. Grout at which you were present? A. Never.

229 Q. That circumstance was never in any way

emphasized in your hearing by Judge Arnoux? A. I do not think I ever heard him mention it.

230 Q. Now, Miss Beardsley was a witness to one of the codicils, was she not? A. I do not know.

231 Q. Were you not present in the Surrogate clerk's office at the preparation of the various formal depositions of the various witnesses to this will and the codicils, and did you not go for the witnesses and bring them there, and had them depose, and attended to it, did you not? A. I do not recollect that.

613

232 Q. And one of them brought there by you was Miss Beardsley, was she not? A. Not that I remember.

233 Q. And you conducted Miss Beardsley from 11 East Fifty-seventh street, to the Surrogate clerk's office for the purpose of having her attest a formal deposition as an attesting witness to one of these codicils, did you not? A. I may have. Now that you mention it I seem to have a faint recollection that I did. It had never occurred to me.

234 Q. Will you state upon the record, any specific reason that occurs to you why you have not
614 been able to remember the presence of an attesting witness before the Surrogate's Court when you were directly charged with the duty of getting her there and seeing that she made her deposition, while you distinctly remember that Miss Anner Amelia Joyce, who was not an attesting witness to anything, was present in the front room upstairs of Mr. Fayerweather's house on the 15th day of November, 1890. I call your attention to the fact that one circumstance would naturally have a tendency to impress your memory, while the other would appear to be a comparatively indifferent circumstance? A. Well, I have taken innumerable witnesses to court almost,

and the fact that I took one I do not think would impress itself on my memory in the least.

235 Q. Is that the only answer you have to make to that question? A. Until you recalled it to my mind I had not the faintest recollection of having gone to the house at East Fifty-seventh street and bringing any lady down to the Court House. I have an indistinct recollection now that I did.

236 Q. Who has recently recalled to your mind that you saw Miss Anner Amelia Joyce in that room
615 for a minute, she being a person that you did not take down to the Court House? A. I remember it.

237 Q. Who has recently recalled to your mind that you saw Miss Anner Amelia Joyce in that room for a minute, she being a person that you did not take down to the Court House? A. No, one; I remember it myself.

238 Q. Do you mean that your memory is so peculiar that you remember indifferent circumstances, but have to be reminded of circumstances directly connected with your own conduct? A. I am not responsible for the vagaries of the human memory.

239 Q. Then you mean that your memory is one that is subject to vagaries?

615

Objected to as incompetent, immaterial and impertinent.

A. My memory is continually surprising me. I assume that it is subject to vagaries.

240 Q. Did you attend the Surrogate's Court during the contest over the codicils? A. I was there the day that I went on the stand, and I think I was there when Mr. Grout gave his testimony afterwards.

241 Q. Any other time? A. I think no other time; I was sick at the time.

242 Q. At what time were you sick when you were a witness? A. I had been sick before that, and there was diphtheria in the house and Idid not want to come down to the court, and I did not come until I was sent for to testify.

243 Q. Was the progress of this contest a matter which you discussed or heard discussed? A. I think it was.

244 Q. Was it considered in the office a matter of great importance to Mr. Ritch? A. I think not, no more than any other important case.

617

245 Q. You spoke of having read about the case in the newspapers, did you not? A. Yes, sir. My only acquaintance with the case since I left the office of Arnoux, Ritch & Woodford up to the present time has been in that way.

246 Q. The newspapers did not begin to discuss this case when you left Arnoux, Ritch & Woodford, did they? A. This particular case?

247 Q. This Fayerweather contest over the will? A. There has been a great deal of the contest in the papers.

248 Q. Yes, and among other matters called to your attentton in that manner was that there was
618 general criticism of the circumstance that by a dying day codicil Mr. Fayerweather's residuary estate amounting to about $3,000,000 appeared to have been given absolutely to Messrs. Bulkley, Ritch and Vaughan as residuary legatees free from any trust of limitation, exclusively for their own individual benefit, and that inasmuch as neither of these gentlemen was related by blood to Mr. Fayerweather or had previously had any intimate relations with him, that circumstance was one creating general public surprise and requiring explanation.

Objected to as incompetent. Newspaper reports are the best evidence as to what they state. And

whether there were or were not such criticism is entirely irrelevant to the question in this case.

A. I think I saw a report to that effect.

249 Q. And you understood that the contest in the Surrogate's Court was aimed at subjecting that absolute title to a limitation by reason of a secret trust claimed to have been accepted by Mr. Ritch from Mr. Bulkley and the result of which would be to take in the neighborhood of a million dollars out of Mr. Ritch's pocket and dispose of it otherwise—you understood that,
619 did you not?

Objected to as immaterial and incompetent.

A. I understood what the result of the contest would be.

250 Q. And that it was that result, did you not?

Same objection.

A. Yes; among other things.

251 Q. And you understood that in the conduct of the contest in your office, or Arnoux, Ritch & Woodford's office, it was considered that the validity and probacy of this dying day codicil were the questions around which the contest would be concentrated, did you not?

620

Same objection.

A. I always assumed that that was the case. I understood, though, that they attacked the whole will.

252 Q. Judge Arnoux has testified and it is in evidence in this case that he anticipated the most vigorous contest about that dying day codicil. Now, did that circumstance enter your mind also—did that circumstance come to your mind also?

Same objection.

A. Yes; I think it did.

253 Q. Well, what you heard in the Surrogate's Court indicated to your mind that that was where the war was waging?

Same objection.

254 Q. So that the contention on the part of your office necessarily was directed to sustaining the integrity of the codicil and the probabilty of the circumstances under which it was executed, and on the other
621 hand to contradict anybody that had anything to say to the contrary?

Same objection.

A. The office, as I understood it, was employed to establish the will.

255 Q. Well, that is the way they had to do it, is embodied in my last question? A. If there was any one to contradict, I suppose they contradicted them.

256 Q. It was a circumstance regarded as important to establish the good faith of this dying-day codicil, that it was made at the time with the full knowledge of, and without any dissent and outcry by the immediate family, was it not? A. I assume as a lawyer that that would be so.

622

257 Q. You understood that as a fact, not only as a lawyer, but as an intelligent man?

Same objection as before.

A. No, I do not think so, I do not know what the family had to do with it.

258 Q. Don't you think as a lawyer and as an intelligent man that the fact that the immediate family were not aware of the execution of a codicil on the day of the testator's death, and that it was procured in their

absence and without their knowledge, would have a very important bearing upon the probability of its being admitted to probate?

Same objection.

A. I think if that were the case it would be an important feature of the contest.

259 Q. And that when Miss Anner Amelia Joyce declared that Mr. Vaughan brought this codicil up with you two other gentlemen from Ritch's office,
623 and that you went into Mr. Fayerweather's room and obtained his signature to it when he was incompetent to perform any such act with due knowledge and intention, and that furthermore this happened when she was on an upper floor of the house taking a rest, and that she did not know that you gentlemen were in the house until she saw Mr. Vaughan conducting you to the front door when it was all over—it was considered important to contradict her by showing that she was in the front room upstairs when you arrived; that she was there for the purpose of smoothing the way of your having the codicil signed; that she had full knowledge of what you were doing and permitted it—is it not so?

624

Objected to as incompetent, assuming facts not proven in the case and calling for the opinion of a witness and not for a fact.

A. I never had any information that Miss Joyce testified to that effect or that she said anything to that effect until you told me here. I did not know that she said she was not in the room.

260 Q. Were you present when the so-called Five College action was being tried before Judge Truax? A. No.

261 Q. Then you were not aware, until I called your

attention to it here to-day, that your testimony that you met Miss Anner Amelia Joyce in the front room before going into the testator's room on the 15th of November, 1890, is in conflict with the testimony of Miss Anner Amelia Joyce, now Mrs. Reynolds? A. I was not.

262 Q. And yet you have given here to-day as the reason why Mrs. Reynolds being in the room on that occasion was fixed upon your memory, was the contest made over the codicil in the Surrogate Court, have you not? A. I have.

625

263 Q. What was there, if you were not aware that Mrs. Reynolds' version of her being in the room was in conflict with your statement on that subject—what was there that occurred during the contest to emphasize that circumstance—merely in your mind? A. The fact that there was a contest emphasized every circumstance connected with the signing of this codicil.

264 Q. Except that you actually took one of the attesting witnesses, Miss Beardsley, from Fifty-seventh street down to the Surrogate's Court and had her make out her deposition as a subscribing witness to a codicil and that you could not remember until I re-
626 minded you of it—is it not so? A. I didn't recollect it until you reminded me of it.

265 Q. Mr. Browning, was the name of Thomas G. Ritch mentioned in Mr. Fayerweather's hearing at that time? A. It was.

266 Q. In what connection and by whom? A. Mr. Grout mentioned it when he read the codicil.

266½ Q. What is there in the codicil that he read to him? A. My recollection is that the codicil states that the executors—that the residuary estate is to be left to the executors, Mr. Bulkley, Mr. Ritch and Mr. Vaughan.

267 Q. Does the codicil name them? A. My recollection is that it does.

268 Q. Are you positive about that? A. I say I think it does.

269 Q. Are you as sure about that as you are of anything else you have testified to here? A. I think I am, yes.

270 Q. Was that the only connection in which Mr. Grout mentioned Mr. Ritch's name in Mr. Fayerweather's hearing on that occasion? A. Unless
627 it appears in the 10th clause of the will which he read, and I don't think that it appears in that.

271 Q. I would like to have you answer whether the name of Mr. Ritch was mentioned? A. I don't think it was.

272 Q. Were Mr. Fayerweather's eyes closed while Mr. Grout was reading? A. Yes.

273 Q. Did he look like a sick man? A. He did.

274 Q. Did he cough? A. I did not hear him cough.

275 Q. Was anything noticeable about his breathing? A. I did not notice anything.

276 Q. Q. Was his breathing rapid? A. I did not notice his breathing at all.

277 Q. Did he seem to have any difficulty about inflating his lungs? A. Nothing that was noticeable.

628

278 Q. You knew that he was dying from consumption? A. Not till afterwards.

279 Q. And you mean to say that you did not see anything about his appearance that would indicate the disease from which he was suffering? A. Nothing except that he was wasted away and looked like a sick man.

280 Q. Did he have any hectic color in his face, apparently—did he have what is called the hectic flush? A. I did not notice it.

281 Q. You have heard that used in connection with people suffering from consumption? A. Yes.

282 Q. And you know that is a characteristic appearance of that disease? A. I do not.

283 Q. Did you notice anything peculiar about his eyes when he opened them? A. Nothing, except that he did not open them very wide.

284 Q. You were able to see the light on them—to see whether the surface of the eye appeared to be glazed or anything of that kind? A. I did not notice
629 anything peculiar of that kind.

285 Q. Well, is that due to the fact that your attention was not called to it, or is it due to the fact that it did not exist? A. I cannot say.

286 Q. You are aware that he died within nine hours after you were there? A. I have been told so.

287 Q. Was there anything in his appearance to indicate that he was a man sick enough to be within nine hours of his death from a progressive disease? A. Not that I was able from my experience to judge. I have not had any experience of that sort.

288 Q. How old were you at that time? A. I was in my twenty-second year.

289 Q. You had never seen any one ill of consumption before that? A. I never had.

290 Q. Did you ever see any one die? A. I never had then.

291 Q. Had you ever seen any one within twenty-four hours of death? A. I think not.

292 Q. Were such utterances, such words as Mr. Fayerweather uttered on that occasion, deliberate and made with apparent effort, or were they quick, and did they indicate that the organs of speech responded readily to the impulse of the mind? A. I cannot say that Mr. Fayerweather uttered any words.

293 Q. Do you recall any sentence that he uttered? A. I do not.

294 Q. Do you mean to say that such communications as came from Mr. Fayerweather on that occasion were made by signs? A. Simply by an assent indicated by the nod of his head.

294 Q. In what manner did you learn whether the proposition to which you took the nod to be an assent had reached his mind and was comprehended by it? A. Simply because he nodded, that is all.

630

295 Q. How many minutes in all your life have you consecutively been in Mr. Fayerweather's presence? A. That is the only time that I can remember.

296 Q. That was only about five minutes, did you say? A. Not over five.

297 Q. Have you ever seen anybody since who had difficulty in breathing? A. Oh, yes.

298 Q. Have you ever seen anybody else since in the last stages of consumption? A. I have.

299 Q. Have you observed that that disease gradually fills up the lungs, or rather makes less and less the volume of the breathing surface of the lungs to which the air reaches in inhalation of air? A.

631 I have not.

300 Q. Are you not aware that the nature of that disease is to encroach more and more upon the volume and surface of the lungs? A. I have been told, as I understand the disease, it is a wasting of the lung tissue, and what its effect is I have been told by different physicians. I know nothing about it.

301 Q. Do you know what office the lungs perform in receiving the air and conveying to the body such benefit as the body gets from breathing?

Objected to as incompetent. Mr. Browning is not an expert on the diseases of the lungs.

A. I think I do.

302 Q. Do you understand that the lungs perform the function of supplying the blood with oxygen from the outer air? A. They purify the blood, that is, the air purifies the blood; that is done I believe by means of the oxygen which is supplied through the air.

303 Q. And do you know that the lungs also perform the office of exhaling the exhausted air and
633 the carbonic acid gas contained in it which otherwise would poison the blood?

Same objection.

A. I understand that the impurities of the blood are carried off in the air which is exhaled.

304 Q. You know nothing of the chemicals of that process? A. I have studied them, but it was a great many years ago.

305 Q. Are you aware that the result or progression of the disease known as consumption is to make the breathing space in the lungs more and more shallow, so that the lungs receive less and less air, and supply less and less oxygen to the blood, and exhale less and less carbonic acid gas?

634

Same objection.

A. I have no personal knowledge on the subject at all.

306 Q. Are you able to say whether Mr. Fayerweather's breathing was deep or shallow on that occasion? A. I am not.

307 Q. Did you see any indications that he was gasping for breath or had any difficulty in inflating his lungs? A. I did not.

308 Q. Now, your going to lunch at the time you did under Mr. Grout's suggestion was not in accordance with your usual habit? A. It was not in accordance with my usual habit, but I always accommodated my lunch to the business of the office.

310 Q. What did Mr. Grout say—say, hurry and get your lunch? A. No, he said he was going to execute a will and wanted me to go as a witness, and if I had not had my lunch that I had better get it.

635

311 Q. Did he tell you that Mr. Woodford was drawing the will and would have it ready presently? A. He did not tell me anything about that.

312 Q. I observed that in giving your testimony as to Mr. Fayerweather's position when you first entered that you used this term, "propped up by pillows." Is that language which you have recently read or heard read to you from Mr. Grout's deposition? A. Possibly, but it is language which I used before I heard Mr. Grout's deposition read.

313 Q. Have you heard any other deposition read from that book? A. I have not, except my own statement before the Surrogate on the probate of the will.

636

314 Q. That was not anything about being propped up with pillows? A. It was not.

315 Q. That is simply the formal deposition? A. Yes.

316 Q. It is a printed blank kept there in the Clerk's office and filled out when the occasion requires? A. Yes.

317 Q. Did Mr. Grout say to Mr. Fayerweather that he had brought a codicil to be executed? A. That is my recollection.

318 Q. Will you swear that he used the word codicil? A. I will.

319 Q. Have you not previously to-day sworn that you are not certain whether he used that word? A. I said I was not certain about the exact language, but not in connection with that word.

320 Q. You have after ten years a distinct recollection that he used the word codicil to Mr. Fayerweather, have you? A. I have.

637

321 Q. You say that Mr. Grout greeted Mr. Fayerweather, what did he do which you describe by that word "greeted"? A. My impression is that he addressed him in some such manner as, good afternoon, Mr. Fayerweather.

322 Q. How long was Mr. Vaughan gone upstairs before he came down when you first arrived? A. Possibly four or five minutes.

323 Q. As long as that? A. Perhaps not so long, from three to five minutes.

324 Q. Have you given any other version of that time than four or five minutes? A. Not that I am aware of.

325 Q. Well, if you have, was that correct, if it is in conflict to four or five minutes? A. It probably was.

638

326 Q. How high was the bed upon which Mr. Fayerweather lay from the floor? A. Why, it was an ordinary black walnut bedstead, as I recollect it.

327 Q. How high was it, the question is, from the floor? A. I say about the height of an ordinary black walnut bedstead.

328 Q. Can you state the number of inches, approximately, that the level of the top of the bed in which Mr. Fayerweather lay was from the floor of the room?

A. I should say something under two feet; that is, that includes the top of the mattress.

329 Q. Will you swear that it was more than sixteen inches? A. Yes, I will.

330 Q. Was it not an extra low bed? A. I don't think it was.

331 Q. Was there more than four inches space between the lower side board of the bed and the floor? A. I do not know.

639

332 Q. What is your best recollection? A. I have no recollection.

333 Q. Was it high enough to have placed under it—between it and the floor—an ordinary chamber utensil? A. I don't know.

333½ Q. What is your best recollection? A. I have none.

334 Q. You remember Mr. Fayerweather got up without assistance and put his legs over the side, do you? A. I think I testified so.

335 Q. That is a very distinct recollection A. Absolutely.

336 Q. Unaided by your perusal or hearing read Mr. Grout's testimony? A. Absolutely.

640

337 Q. And yet you cannot tell whether the top of the bed on which he reclined was more or less than two feet? A. Not within several inches.

338 Q. You cannot tell whether the lower sideboard was more than four inches? A. I have no recollection as to the sideboard.

339 Q. How large a man was Mr. Fayerweather? A. I do not know.

340 Q. What is your best recollection? A. I never saw him standing up.

341 Q. I understand that; now answer the question? A. I haven't any idea.

342 Q. Was he a man of average—ordinary height—according to your best recollection? A. I should say he was a man quite up to the average height.

343 Q. Five feet nine inches? A. Five feet nine and one half inches, about that.

344 Q. Not under that? A. I say I haven't any means of telling how high he was. I saw him sitting on the edge of the bed.

641

345 Q. He was not covered up when he sat up and put his legs over, was he? A. His legs were not covered up.

346 Q. Did you see his legs? A. I did.

347 Q. Were they attenuated? A. Yes.

348 Q. Very? A. Yes, very—very thin.

349 Q. Well, were his legs as long as yours from the knee down? A. I think not.

349½ Q. How much less. Give it a length to make a long matter short? A. I haven't any idea how long my own legs are.

350 Q. As a matter of your best judgment and recollection how long do you think his legs were
642 from the knee down? A. I should think about sixteen inches would cover it, but that may be absurdly short for all I know. I should say if I said his legs were 20 inches from the top of the knee down that I would be coming pretty near it.

351 Q. As he sat on the bed was he erect on the bed, that is, I mean as erect as any one sitting is—was his back in a perpendicular position? A. Yes, except that it was bent forward.

352 Q. He slumped down? A. He stooped forward. He did not sit up with his shoulders back.

353 Q. He was round shouldered? A. He was round shouldered.

354 Q. Did he get any support from the pillows at that time? A. Not when he was sitting up.

355 Q. He had abandoned the support of the pillows? A. Yes.

356 Q. And therefore he was relying to sit up on the vertebral column and the muscles attached thereto? A. I think he was.

643

357 Q. You did not see anything else to support him? A. I did not.

358 Q. He was using his arms to write? A. Yes.

359 Q. Holding the codicil on the book with the left arm and hand, and using the pen with the right? A. I don't recollect his holding the codicil.

360 Q. To the best of your recollection he did not hold it? A. I do not recollect anything about that, whether he was holding the codicil or not.

361 Q. Then you do not recollect that he was supporting himself? A. No.

362 Q. And if Mr. Grout testified that, so far as you recollect, it is correct, is it? A. If he testified that, I have no doubt it is correct.

644

363 Q. Is it so if he did not so testify? A. No, I do not think it is.

365 Q. That is to say, you think it necessary to establish a fact in this case that Mr. Grout should testify to it? A. I do not.

366 Q. So far as you can recollect, Mr. Fayerweather was being supported by his vertebral column and the muscles attached to it at the time he was sitting up with the codicil on his lap, is that correct? A. I don't remember the codicil being on his lap.

367 Q. Where was the codicil when he wrote his name to it, do you remember that? A. I do not.

368 Q. Well, did he get any support in getting himself seated, as you describe, by his feet resting on the floor? A. I could not say; I think his left foot did not rest on the floor; whether his right did or not I do not know.

369 Q. Do you mean to say that you have a distinct recollection that his left leg was exposed but did not reach the floor? A. My impression is that it did not.

645

370 Q. Do you have a distinct recollection? A. I have a distinct impression.

371 Q. What distinction do you mean to imply between a distinct recollection and an impression? A. I do not think that an impression is as clear as a recollection.

372 Q. But you think that an impression may be distinct and yet not clear? A. I do. I could not see his right leg after he had put them out of bed because I was standing at the foot of the bed.

373 Q. Then, standing at the foot of the bed, you are able to recollect that his left foot was not on
646 the floor because it was on the bed? A. It was not on the bed, it was out of bed.

374 Q. Then I take it some part of his leg must have been resting on the top of the bed? A. Not below the knee.

375 Q. Not below the knee; that is, his left leg was flexed at the knee so that the foot may have been on the floor? A. No; I say that his left leg hung over the side of the bed.

376 Q. Did it hang over so it could or could not have reached the floor? A. It could have reached the floor if it was long enough.

377 Q. What is the fact? A. I said that the fact is that that foot did not reach the floor.

378 Q. You observed that? A. I say I did.

379 Q. But you won't call it a distinct recollection? A. I will not.

380 Q. You were not in a position to see whether the right foot was on the floor or not? A. No, because the left foot was in the way.

381 Q. You were looking down on the level of the bed and standing close to the foot of the bed, were
647 you not? A. I was looking down on the bed.

382 Q. Standing close to the foot? A. And standing close to the corner.

383 Q. And you are a man of six feet or so in height? A. A trifle over.

384 Q. And you were so then, were you not? A. I was.

385 Q. And yet you say you could not see whether the right foot was on the floor because the left foot was in the way of it? A. I do.

386 Q. Did Mr. Vaughan say, while you were going up in the train, that he had that morning obtained $175,000 in securities from Mr. Fayerweather for Mrs. Beardsley, for himself and for Mr. Myrick? A.
648 Not that I heard.

387 Q. Did he say that Mr. Fayerweather had reached such a condition of body and mind that he was giving away securities at the rate of $175,000 that morning? A. No.

388 Q. Did he say that Mr. Fayerweather was too far gone to know what would occur on the execution of this codicil? A. I did not hear him say anything on the subject.

389 Q. Did he appear to be at all excited or to be in a hurry as you were going up? A. Did not notice anything of that sort.

390 Q. Had you ever seen him before? A. I think not.

391 Q. Did you notice Mr. Vaughan in the office before Mr. Grout told you to get ready to go up and attest the will? A. Not to know him.

392 Q. And you did not hear anything said there? A. Not a word.

393 Q. Did Mr. Fayerweather, when Mr. Grout explained to him that he was to execute a codicil giving his residuary estate to Mr. Ritch, Mr. Bulkley and Mr. Vaughan, say that he had four days before ex-
649 ecuted a codicil drawn by Prescott Butler to prevent that very disposition of his residuary estate? A. He did not.

394 Q. Did he say that he had that morning given instructions to Mr. Vaughan as to what he wanted put in that codicil, and that Mr. Vaughan had taken down the instructions in writing and had gone away to have the codicil drawn in accordance therewith, and that the codicil which you brought back for him to sign did not contain the most remote resemblance to the instructions or to any part of them and did not contain any provision embodied in the instructions, but merely restored the condition of things which had been destroyed on the 11th of November except that they added Mr. Vaughan as one of the bene-
650 ficiaries and legatees of the residuary estate? A. He did not say anything as I recollect it.

395 Q. Did he express any astonishment at the divergence between the terms of the codicil read to him by Mr. Grout from the instructions which he had that morning given Mr. Vaughan for its preparation? A. He did not.

396 Q. Did Grout explain to Mr. Fayerweather on that occasion that he was aware of the instructions which Mr. Fayerweather had given that morning for the codicil, but that Mr. Vaughan had ascertained

that Mr. Fayerweather was likely to die at any moment and that, therefore, there would not be time to embody in the codicil all or any of the specific instructions, and that for that reason Mr. Vaughan had decided to reinstate the former condition of things whereby the residuary estate should be devised as an absolute devise to the three men, Bulkley, Ritch and Vaughan? A. Did not say anything about that.

397 Q. No reference made by either Mr. Grout or Mr. Fayerweather to the fact that the codicil had been preceded by specific instructions given that
651 morning as to what it should contain? A. None.

398 Q. Did Mr. Fayerweather call for Mr. Vaughan to explain the divergence between the codicil and the instructions given to Mr. Vaughan? A. No.

399 Q. Did Mr. Fayerweather know that Mr. Vaughan was in the front room? A. I do not know.

400 Q. What reason have you to suppose that Mr. Fayerweather knew that Mr. Grout came from Mr. Ritch's office? A. None, except that Mr. Fayerweather was acquainted with Mr. Grout.

401 Q. How do you know that? You never saw them together? A. Because Mr. Grout told me he knew him.

652

402 Q. Is that the only reason? A. That is the only reason, and the fact that Mr. Grout greeted Mr. Fayerweather as an acquaintance.

403 Q. In what way do you think that conveys the idea that Mr. Fayerweather knew and realized that Mr. Grout came from Mr. Ritch's office? A. I simply assumed that he knew that he was connected with the office. I do not know anything about it.

404 Q. When you assume that, you assume that Mr. Fayerweather was in an ordinarily normal condition of body and mind and able to recall information and

knowledge as to his various acquaintances, do you not? A. I do.

405 Q. Does the fact that he died nine hours after seem to you to require that the assumption which you then made should be modified in view of the later event? A. I think not.

406 Q. You think, then, that a man within nine hours of his death from consumption, who is emaciated, who appears to you to be a sick man, and who upon so important a matter as the execution of his last
653 will and testament disposing of an estate of three millions of dollars, that is the residuary estate, communicates with the persons charged with that business only by means of nods, and who writes such a signature as is appended to that paper, may be fairly assumed to have in mind and recall the circumstance that one of the persons in question is connected with the law office of Mr. Ritch? That is the question.

Objected to as incompetent. Mr. Browning is not an expert on mental conditions or physical conditions. Question calls for the opinion and not fact.

A. I should think so, if my opinion is of any value on a subject like that.

654

407 Q. Were you aware that at that time Mr. Vaughan had persuaded Mr. Fayerweather that Mr. Ritch had been engaged at the beginning of his preparation of testamentary papers for Mr. Fayerweather in a scheme to get Mr. Fayerweather's fortune so far within his power and control as to enable him to appropriate it to his own use · that Mr. Vaughan had characterized Mr. Ritch to Mr. Fayerweather as a scoundrel, had persuaded him that Ritch's intentions were dishonest, and that his only safety was to make a codicil which should displace Ritch and take away the power which he had

under the existing will and codicils, and to reinstate the 10th clause of the will, so that whatever infirmity there might be in the carrying out of Mr. Fayerweather's wishes would be due rather to the operation of the Statute of Wills than the misplaced confidence which he had been led to put in Mr. Ritch, and that Mr. Vaughan had made Mr. Ritch aware that Mr. Fayerweather would not see him, and that Mr. Ritch himself had written a letter in which he expressed his regret that Mr. Fayerweather would not see him, and
655 showed his own understanding that Mr. Fayerweather's confiidence in him as an honest man had been impaired, and in which he endeavored to get Mr. Fayerweather to see him and to listen to his explanations and to reinstate him in Mr. Fayerweather's good opinion, and that Mr. Fayerweather had refused to see Mr. Ritch and paid no attention to his appeal that Mr. Ritch should see him.

Objected to as irrelevant, immaterial and incompetent.

A. I was not.

408 Q. Those facts appearing, would it modify your confidence that Mr. Fayerweather knew that Mr. Grout was from Mr. Ritch's office on that occasion.

656

Same objection.

A. No. It would not.

409 Q. It would not. Those circumstances appearing, would it modify your confidence that Mr. Ritch instead of seizing upon the opportunity which he had just previously besought to set himself right with Mr. Fayerweather, should have sent two clerks from his office to attend the execution of this paper, the practical effect of which was to reinstate Mr. Ritch in all that he

had lost by Mr. Vaughan's representations or misrepresentations during the previous week? A. I do not think that was the effect of the paper.

410 Q. Well, whatever you may think about the effect of the paper, does it modify your confidence that Mr. Fayerweather knew that Mr. Grout came from Mr. Ritch's office, that Mr. Ritch himself was not under the circumstances the bearer of the paper? A. No, I never knew Mr. Ritch to act while I was in the office in that capacity.

657

411 Q. In what capacity? A. As bearer of a will to have it executed to any client.

412 Q. Did he not superintend the execution of the other codicils to the will previously executed by Mr. Fayerweather? A. I don't know.

413 Q. Did you know that Mr. Fayerweather had been obliged to use glasses—spectacles of a very high magnifying power—three or four years before his death? A. No.

414 Q. Did you know that it was necessary for him to supplement these with quite a large magnifying glass when he attempted to read any paper? A. I
658 never saw or heard of Mr. Fayerweather before that day.

415 Q. Was Mr. Fayerweather wearing spectacles when you arrived? A. I think not.

416 Q. Did he put any on? A. I think not.

417 Q. Did he use any magnifying glass? A. No.

418 Q. Did anybody point out to him where he should begin his signature? A. I think Mr. Grout pointed to where he should sign—not begin or end—simply where he should sign.

419 Q. You think Mr. Fayerweather was able to find the place for his signature without any aid from Mr. Grout, did you? A. I think he did.

420 Q. That is to say Mr. Grout only indicated to him the general position with reference to the rest of the papers where the signature should be, is that what you mean? A. Yes.

421 Q. And what leads you to say that—anything that Mr. Grout said? A. I would not like to say that Mr. Grout said anything. My recollection is that he simply pointed to the place where the signature should be.

659

422 Q. You deny that he took hold of Mr. Fayerweather's hand and placed the pen where he should begin, do you? A. I do.

423 Q. Could that have been done without your seeing it? A. It could not.

424 Q. (Handing codicil to witness.) Will you look at the signature of this codicil and see whether you discern any difference in the firmness or character of the handwriting between the "D," the first initial, and the end of the writing in the word Fayerweather? A. I do, yes.

425 Q. Does it seem to you that it has the characteristics of a handwriting under control and carry-
660 ing out with considerable variation of curve and movement the intention of the writer's mind? A. I know nothing of any such thing. I never saw handwriting of that sort and I am not competent to judge.

426 Q. Then as far as the characteristic of the handwriting is concerned and if you had not seen that name written there by one man, you would not be able to say whether two men participated in writing that D. B. Fayerweather? A. It looks to me like the same man's handwriting.

427 Q. Then you are able to form and express opinion on the matter which just awhile ago you said you could not? A. I am not.

428 Q. Well, now I will ask you again the question I asked you before about the "D." Will you look at the signature of this codicil and see whether you discern any difference in the firmness or character of the handwriting between the "D," the first initial, and the end of the writing in the word Fayerweather?

Objected to as incompetent; calling for opinion and conclusion and not for a fact. Witness is not an expert in handwriting.

661

A. It looks to me like the signature of one man and I know it is, because I saw him sign it.

Counsel for the complainants moves to strike the answer out as not responsive.

429 Q. Did you hear Mr. Fayerweather say after he had written that name, "Pshaw, that is a pretty signature for a man to write," or any equivalent words indicating dissatisfaction with his handwriting? A. I do not recollect hearing him saying anything.

430 Q. You are aware—you heard what was said, did you not? A. Yes. He may have said it, but I have no recollection of it.

662

Counsel for the complainants moves to strike the answer out as not responsive.

431 Q. Did you not know that the effect of this codicil among other things was to revoke and nullify a codicil executed by Mr. Fayerweather four days before? A. No.

432 Q. Well, what reason have you to think that Mr. Fayerweather knew that it had that effect? A. I have not any.

433 Q There was nothing which happened while you were there to convey to any one the idea that it had that effect, was there? A. Noth ng.

434 Q. Did you say anybody said immediately before you went into the room, everything is ready? A. I remember that there was some conversation there, but I don't remember what it was.

435 Q Was there any inquiry as to whether Mr. Fayerweather was ready to execute the paper? A. I do not know.

663

436 Q. Don't recall that? A. I don't recall anything that was said in the front room except that I was introduced to the ladies there.

437 Q. You were introduced to Mrs. Fayerweather too; you remember that, do you? A. I remember Mrs. Fayerweather, yes. And there was some conversation after that that I did not pay any particular attention to; don't remember what was said.

438 Q. And yet you remember that Mr. Grout said to Mr. Fayerweather this is a codicil and not a paper or instrument or any other term or description? A. I remember that he told Mr. Fayerweather that he had brought a codicil to be executed.

664

439 Q. And used the word codicil? A. Yes.

440 Q. Did Mr. Fayerweather listen to the reading of the codicil through by Mr. Grout? A. I assume that he listened.

441 Q. He did not interrupt him, did he? A. I don't think he interrupted him.

442 Q Are you positive of that? A. I know he did not stop him; Mr. Grout read it through.

443 Q. I ask you whether you are positive that Mr.

Fayerweather did not interrupt him? A. What do you mean by interrupt?

444 Q. I mean probably what you do, as you seem to have drawn a distinction—answer it in the sense in which you understood it? A. I have no recollection that he interrupted him in any way.

445 Q. You have no recollection that he said anything during the interview? A. I cannot remember that he said anything.

665

446 Q. Who handed the pen to Mr. Fayerweather? A. I think Mr. Grout did.

447 Q. Have you any doubt about it? A. I have no doubt about it.

448 Q. Do you mean you distinctly remember that he did? A. I have a recollection that he did.

449 Q. Is it a distinct recollection? A. It is a recollection.

450 Q. Is it as distinct as any other thing you have testified to here? A. It is not.

451 Q. Can you state any other fact you have testified to here, the recollection of which is more distinct than that? A. Yes.

666

452 Q. What was it, that Miss Anner Amelia Reynolds was present in the front room, for instance? A. I am as confident of one as the other.

453 Q. Equally so? A. Not necessarily equally so.

454 Q. I am asking you are you equally so? A. No, I don't think I am.

455 Q. Then you remember that she was there more distinctly than you remember whether Mr. Grout handed the pen to Mr. Fayerweather? A. No, I don't think—I think it was the other way.

456 Q. That is, you remember that he handed the pen to Mr. Fayerweather more distinctly than you remember her being in the front room, is that so? A. I think if there is any inequality, that that is the case. I remember much more clearly that Mr. Grout asked me to get my lunch, for instance. It was of more interest to me, then.

457 Q. You did not take much interest at the time in this occurrence, did you? A. I did take a great interest in it; it was my first experience.

667

458 Q. But in taking the interest you did, the question of lunch was of more interest to you; is that what you mean? A. I used to have a pretty fair appetite.

459 Q. Mr. Grout says that he read nothing to Mr. Fayerweather but the codicil then executed and the 10th clause of the will; is that your recollection, too? A. That is my recollection.

460 Q. This codicil then executed contained nothing in the world but a provision that he ratified and confirmed his will and the codicils thereto, that he confirmed the revocation of the 10th paragraph of the will, and that he amended and changed the third
668 paragraph of the codicil dated and made December 13, 1884, in the manner therein stated; did Mr. Grout read to him the third paragraph of the codicil dated December 13, 1884? A. I don't remember his doing it.

461 Q. He may have done so and you have forgotten it? A. Such a thing is possible.

462 Q. Well, is it within reasonable possibility, having in mind what you know about your memory at this time of that occurrence? A. Why, yes.

463 Q. For aught you remember he read not only the 10th paragraph of the will and this codicil, but also read the third paragraph of the codicil dated December 13,

1884? A. I don't remember his reading the 3d paragraph of that codicil.

464 Q. But for aught you remember he may have done so, that is the question? A. I cannot answer that. I cannot remember that he did, and have to assume that he did not.

465 Q. And you cannot remember whether your recollection of what he did is so exact as to exclude the possibility of his having read the third paragraph of that other codicil? A. I cannot recollect that he read it.

669

466 Q. And you cannot recollect that he did not read it, is that so? A. No, that is not so.

467 Q. Then you can recollect that he did not read it, is that so? A. That is not so.

468 Q You have testified in substance that Mr. Fayerweather understood what he was doing, have you not, on this occasion? A. In my opinion—that was a matter of opinion.

469 Q. And did you understand what he was doing? A. I did.

470 Q. Well, did you understand what he was doing any more than that he was writing his name to this
670 paper. Did you understand the legal effect of what he was doing? A. Not particularly; I heard the codicil read and I knew what he was signing.

471 Q. But you did not hear the third clause of the first codicil read, did you? A. I cannot remember that I did.

472 Q. Don't you know now that this codicil depends entirely for its effect on the third paragraph of the first codicil, and that without that it is utterly unintelligible? (Handing paper to witness.)

Objected to as incompetent, calling for the opinion of the witness and not a fact.

A. I do not think that is so.

473 Q. The substantial provision of this paper, beyond revoking previous testamentary acts and confirming one, is to amend and change the third paragraph of the codicil, dated December 13, 1884, so as to read as follows: "The disposition of his residuary estate by giving it absolutely to Bulkley, Ritch and Vaughan, to them and their heirs forever." Do you know what the third paragraph of the codicil dated December 13, 1884, provided? A. I have seen it, but I don't remember now.

670

474 Q. When did you see it? A. I saw it at the time that this thing was first in the courts.

475 Q. That was after his death, I take it? A. Oh, yes.

476 Q. At that time, however, you did not see it? A. I did not see any of the papers.

477 Q. And you don't remember now what it provides, do you? A. I think it provides the same as the last one, only it doesn't include Mr. Vaughan.

478 Q. Then the only change, as you understand it, made by this codicil was to put Mr. Vaughan on the same footing that Mr. Ritch and Mr. Buckley had been prior to the codicil of November 11, 1890, is that
671 so? A. I don't know anything about the codicil of November 11th.

479 Q. You know there was such a codicil? A. No.

480 Q. Have you learned so much about this suit without hearing about that one known as the Butler codicil? A. I don't think I know anything about that codicil.

481 Q. Did you ever hear of a codicil drawn by Mr. Butler?

Objected to as irrelevant, immaterial and incompetent.

A. I think I have seen it in the papers that there was an alleged codicil drawn by Mr. Butler.

482 Q. You don't know that Mr. Vaughan testified that Mrs. Reynolds had destroyed it? A. No.

483 Q. You don't know that whatever became of it, it was never destroyed in the presence of Mr. Fayerweather? A. I don't know.

484 Q. You consider that all that Mr. Fayerweather needed to know to intelligently sign this paper and execute it as a codicil was that he should have
673 the 10th clause of the will read to him, is that so? A. And the paper.

485 Q. And this paper? A. Yes.

486 Q. And it was not essential at all that he should have read to him the paragraph of the codicil which this paper amended and changed?

Same objection as before.

A. It would seem so to me now, but that question has never presented itself to my mind before.

487 Q. Does not that depend upon the assumption that Mr. Fayerweather at the time and place had in his mind, recollection, apprehension and understanding of the provisions and effect of all his previous testamentary papers?

674

Same objection.

A. I think it does.

488 Q. And whether he had in fact or not you do not know, and you have no means of surmising except that when Mr. Grout spoke to him he nodded his head, have you? A. I only have his own acts.

489 Q. And those are his acts? A. The fact that he voluntarily signed this codicil, that he heard it read, and nodded his head, showing that he understood it.

490 Q. You have no other reason to give for supposing that he understood it? A. Only his actions.

491 Q. What actions other than those, if any? A. The fact that he nodded his head signified his assent.

492 Q. We have had that, are there any others? A. The fact that he sat up without any assistance and signed his name voluntarily.

493 Q. His sitting up without assistance, and the voluntary signing of his name, seemed then to you to be important factors in establishing the integrity of
675 this document as a codicil, is that so? A. If he had been assisted to sit up I don't think it would have made the slightest difference.

Counsel for the complainants move to strike the answer out as not responsive.

494 Q. His sitting up without assistance and the voluntary signing of his name, seemed then to you to be important factors in establishing the integrity of this document as a codicil; is that so?

Objected to as irrelevant, immaterial and incompetent, calling for the opinion and conclusion of the witness and not for a fact.

A. That is so to some extent.

676

495 Q. Did Mr. Fayerweather in writing his name seem to have any loss of power—I mean as the name proceeded to be written, did it appear to be more difficult for him at the outset, for instance, when he made the "D"? A. Why, I was not sufficiently near to see anything, except that he was moving his hand and his pen, and the whole signature was more or less labored in my opinion.

496 Q. How long did it take him altogether to write it? A. Of course, it was only a matter of a few seconds; perhaps three seconds.

497 Q. Was it a longer proceeding than it is ordinarily for a man in health to write his name—a man that is an ordinarily skillful penman? A. I think it was longer.

498 Q. Did the labor appear to be due to his difficulty in seeing where he was writing or to his exhaustion—his general debility, or to what circumstance otherwise? A. I thought at the time that it was due to the trembling of his hand more than anything.

499 Q. Is that a symptom of the disease?

677

Objected to as incompetent.

A. I don't know.

500 Q. Well, did it appear to you to be the effect of his debilitated condition? A. I thought that it was the result of his being sick. I knew he was sick.

501 Q. Well, did you have any other means of knowledge that he was sick except that he was in bed in the daytime? A. He didn't look well—was not hale and hearty.

502 Q. Did he appear to be taking much interest in what went on around him? A. No; he did not.

678

503 Q. Well, seeing him as you then saw him, and hearing soon afterwards that he had died that night, was it a matter of surprise to you that he had died that night, having in view what you had seen of him when you had seen him last?

Objected to as incompetent, calling for the opinion of the witness.

A. I was surprised.

504 Q. You were surprised; you expected him to last longer.?

Same objection.

A. I had no idea he was near death.

505 Q. Did you see Mr. Grout write in the date of the witness clause of this codicil, the 15th? A. I do not recollect seeing him.

506 Q. Was not that done before he signed it? A. I presume it was.

507 Q. Don't presume; have you any recollection? A. No; I did not see it.

679

508 Q. You did not see it written in before you signed it? A. I did not see it written.

509 Q. When you signed it the date was not in there? A. I don't remember seeing the date written.

510 Q. That does not answer the question? A. I don't remember whether the date was there or not.

511 Q. You do not say that it was written there before you signed as a witness? A. I don't remember whether it was written or not.

512 Q. Do you know the handwriting of the endorsement of this paper? Is that Mr. Grout's handwriting (showing witness paper)? A. I think it is.

680

513 Q. Did you see him write it? A. No.

514 Q. Do you know when he wrote it? A. No.

At request of complainants, counsel for the defendants hands the witness the original will of Mr. Fayerweather, marked Complainant's Exhibit No. 1, January 24, 1901. Counsel for the defendants also hands witness the first codicil, being Complainant's Exhibit No. 2, of January 24, 1901; the second codicil, marked Complainant's Exhibit No. 3, January 24, 1901; the third codicil, marked Complainant's Exhibit No. 4, January 24, 1901.

515 Q. I ask you to look at the initial "D" in all those signatures and to see whether the loop to the right in any of them comes down to the staff or base line of the context of the writing?

Objected to as irrelevant, immaterial and incompetent. The witness is not an expert in handwriting, and the signature upon the papers are the best evidence.

681

A. No; it seems to come to a different place in each one.

516 Q. Does that appear to you to be characteristic?

Same objection.

A. That it comes to a different place?

517 Q. That it does not in any of them come down to the staff or base line?

Same objection.

A. I don't know whether it is characteristic or not. It is a fact.

682

518 Q. Now look at the signature of the dying-day codicil and see whether the initial "D" in that differs from the other signatures you have just seen in that respect? A. I do not understand what you mean.

518½ Q. Now look at the signature of the dying-day codicil and see whether the initial "D" in that differs from the other signatures you have just seen in that respect? A. In one case it comes as near to the line as the rest of the signatures.

519 Q. Which is that, give the exhibit number? A. Exhibit No. 3, the rest of the signature, with the ex-

ception of the last few letters, which are lower. In the others it does not seem to come down quite to the line. One it is half way up.

520 Q. Do you say that in Complainants' Exhibit No. 3 that loop comes down to the line to which the staff letter—the first down stroke—goes ?

Same objection.

A. The whole "B."

521 Q. "D," are you talking about "B?" A. No.

683

522 Q. "D"? A. The loop comes not as far as the beginning of the letter, but it does come down as far as the rest of the signature with the exception of the last three or four letters.

523 Q. Now, I ask you whether you observe that the dying-day initial "D" comes down to the line in which the first stroke of the "D" comes and to the staff line ?

Same objection.

A. Yes.

524 Q. Now, look at the endorsement in Mr. Grout's handwriting and state whether you can see any
684 difference between the "D" where it appears there and the "D" which purports to be the first letter of the signature ?

Same objection.

A. I think there is quite a difference.

525 Q. In what respect ?

Same objection.

A. There is a decided loop in Mr. Fayerweather's "D" and there is none in Mr. Grout's.

526 Q. What loop? A. Loop at the foot of the initial line of the "D."

527 Q. Is the loop to the "D" in Mr. Grout's endorsement, about which we have been talking, like the loop to the signature "D" in respect to coming down to the line?

Same objection.

A. In that respect, yes.

685

528 Q. Having your attention called to that fact, do you still adhere to your recollection that Mr. Grout's hand did not touch Mr. Fayerweather's hand during the process of writing the signature to that codicil? A. I do.

529 Q. You cannot remember whether the codicil lay upon the table or upon Mr. Fayerweather's lap when Mr. Fayerweather put his name to it? A. No, I cannot.

530 Q. How near the bed was the table at any time? A. The table was moved up near the bed——

531 Q. How near? A. I cannot seem to distinguish whether it was moved up near enough for Mr. Fayerweather to write on it, or whether it was not.

686

532 Q. Was it moved so that a vertical line drawn up along the side board of the bed would have touched the top of the table, or did the top of the table project over the bed as it was moved up—as the table was moved up? A. I can remember that it was moved, and yet I cannot recollect what that will rested on?

533 Q. You remember that the table was moved? A. The table was moved, and I remember our sitting at it and signing as witnesses.

534 Q. You have a distinct recollection of the table? A. Yes; of that occurring.

535 Q. Of the table being moved? A. Yes.

536 Q. And that is as distinct as your recollection of any other fact you have testified to? A. That is absolutely distinct.

537 Q. And if you are mistaken about that, you may be mistaken about any other--anything else you have testified to? A. I am not mistaken about it.

687

538 Q. I say, if you are mistaken about that, you may be mistaken about anything else you have testified to? A. I may—I can.

539 Q. Is it necessary to go into that proposition; if you are mistaken about that, you may be mistaken about anything else you have testified to; is that right? A. I may be mistaken about anything.

540 Q. But you are sure you are not mistaken about that table being there and being moved toward the bed? A. I am confident that it was moved toward the bed.

541 Q. You don't remember whether it was a square table or a round table? A. I do not.

688

542 Q. And your best impression is that the codicil rested on that table while Mr. Fayerweather was writing his name? A. No.

543 Q. Or that it did not? A. My best impression is that it did not, but I do not want to be mistaken in such a point, and I have not a sufficient impression to testify one way or the other.

544 Q. If the codicil were resting in any way upon Mr. Fayerweather's lap was it necessary, as he then was, for him to turn—to get up and turn facing the window and put his legs over the side of the bed? A. Well, if it was resting on his lap, it was not until afterward.

545 Q. Well, if it was put there afterwards, it was feasible to put it there before, was it not? A. He could have signed in bed.

546 Q. And without moving, simply as he sat when you first came in? A. By putting his knees down, he had his knees up.

547 Q. And putting a book in his lap--he could have signed without putting his legs over the side of the bed? A. I think that is possible.

689

548 Q. Was not it the most probable thing for him to do? A. For myself it would be more comfortable to write sitting up.

549 Q. He was sitting up when you went in, against the pillows? A. He was lying half sitting up.

550 Q. He was lying half sitting up? A. Yes.

551 Q. Was he sitting up or not when you first went in? A. I should say that he was lying at an angle of forty-five degrees back against the pillows.

552 Q. Would you have any difficulty in writing in your lap in that attitude? Without changing it? A. I am sure I would.

690

553 Q. You are certain you would? A. Yes, great difficulty in writing in my lap any way.

554 Q. Is that due to anything out of common in your physical formation? A. It is due to the fact that in order to write, I need a support for my arm.

555 Q. Your arm is not sufficiently supported by being connected with your shoulder? A. Not for a good signature.

556 Q. Do you consider that a good signature appended to this codicil? A. I do not.

557 Q. According to your recollection, is the fact that

Mr. Fayerweather got up and flung his legs about and over the side of the bed, sat erect, as a preparation for signing his name, due to the fact that he was adjusting himself with reference to the table on which the codicil rested? A. Mr. Fayerweather did not fling his legs around; he pushed them out of bed very slowly; and I do not recollect where the codicil was, as I have already testified, whether it was on his knees or on the table.

691

558 Q. But you are all the time sure of the table, and nothing that has been said impairs your recollection in the slightest that the table was there and was moved towards the bed? A. Yes, I signed at the table.

559 Q. And did Mr. Grout sign at the table? A. Yes.

560 Q. That is a matter of distinct recollection with you? A. He sat in the chair after I got up—after I signed.

561 Q. In Mr. Fayerweather's room? A. Right after me.

562 Q. You cannot be mistaken about that? A. I don't think I can.

692

563 Q. And he signed with the same pen and the same ink with which you signed and Miss Joyce signed? A. I cannot say.

564 Q. You cannot say? A. His signature looks as if he did not.

565 Q. Well, was there more than one supply of ink in the room at the time? A. I only saw one

566 Q. It might have been there without your seeing it? A. There might have been quantities that I did not see.

567 Q. And Mr. Grout might have used it without your seeing it? A. He could not have used another ink

well. He might have used a fountain pen. He always carried one and always did use one in the office.

568 Q. Did you see him take out a fountain pen in Mr. Fayerweather's room? A. I do not remember.

569 Q. You mean that your memory is not sufficiently clear to enable you to state whether he did or did not? A. Yes. I have no recollection whether he used the pen I did or another one, and my only inference is from the signature, which is apparently made by a different pen, and from the fact that I know he carried a fountain pen and almost always wrote with it.

693

570 Q. As a matter of distinct memory you cannot bring back to your mind that you saw any fountain pen in his hand in Mr. Fayerweather's room? A. It would not impress itself on my mind, as I was accustomed to seeing him write with a fountain pen always.

571 Q. Upon that assumption what was the matter with his furnishing the fountain pen for all of you to write with, instead of sending for another pen and ink? A. Possibly he did not care to lend it.

572 Q. Is that the only explanation you can think of? A. Possibly it did not occur to him.

694

573 Q. And possibly he may not have written his name in the room at all? A. No.

574 Q. That you are clear about, are you? A. He wrote his name in the room after I did.

575 Q. And whether he did it with the same pen or with a fountain pen which he usually carried, you do not know? A. I have not sufficient recollection to say.

576 Q. You are quite clear that Mrs. Reynolds, a lady who you never saw before, was in the room—the front room—preceding your going in there, and that you were there introduced to her, and that she heard a conversation which indicated to anyone hear-

ing it that a codicil was to be signed, but you cannot recollect whether after Mr. Grout called for pen and ink and you had been delayed by waiting for it to be brought from the adjoining room, whether, when his turn came to sign as a witness, he produced a fountain pen from his pocket and wrote with it, is that correct? A. I testified to that.

577 Q. And is that a correct summary of what you have testified to as you remember it?

695

Objected to as incompetent. What the witness has testified to already appears.

A. I think that is substantially correct.

578 Q. Did Mr. Grout, in the cars coming up on that occasion, say in your hearing that he thought it was his duty to be extremely careful to see that all of the statutory requirements were carefully fulfiled and that Mr. Fayerweather, who was to sign it, knew what he was signing. Did you hear him say that? A. No.

579 Q. Did Mr. Fayerweather interrupt Mr. Grout's reading of the codicil or of the 10th clause by saying, "Yes, yes, I know," so far as you heard? A. I

696 don't recollect it.

580 Q. Did Mr. Fayerweather appear so far as you observed or saw to take any interest in the question whether his signature was a good, bad or indifferent one, after he had appended it to the codicil? A. I have no recollection of anything.

581 Q. Did you underttand at that time what modification any previous codicil had made in the 10th article of the will? A. No.

582 Q. Well so far as that codicil confirmed previous codicils, you being in ignorance as to how far

those codicils modified the 10th article of the will, you did not know what the effect of the codicil which you saw executed was upon the general body of testamentary papers at that time, did you? A. Except as it states itself.

583 Q. That is, except as it refers to the residuary clause, that is the only respect in which it states itself; all the rest is by reference? A. I think it was.

584 Q. Did you know any more about those papers and their effect than Mr. Grout knew?

697

Objected to as immaterial.

A. I did not know anything about them.

585 Q. He knew more about them than you did? A. I did not know anything; if he knew anything, he knew more than I did.

586 Q. You were not chosen to go there to superintend the execution of this paper, or for the purpose of giving Mr. Fayerweather any information or instruction respecting the effect upon his estate of the execution of this paper?

Objected to as irrevelant, immaterial and incompetent.

698

A. Nothing of the kind was ever mentioned to me.

587 Q. And you understood that Mr. Grout was selected that morning, without previous notice, to do his part?

Same objection.

A. Did not know anything about it.

588 Q. Did he not tell you that he had just been notified to go up, and wanted you to go along with him? A. He did not.

589 Q. And you did not know that Mr. Woodford, while he was drawing this codicil, called out to Mr. Grout in the next room that he wanted him to go up and attend to the execution of it, and to get another witness to go with him, whereupon Mr. Grout suggested that you were attainable? A. No, not until Mr. Grout came out and told me he wanted me to act as a witness.

590 Q. Where did he come out from? A. Came out of his room.

699

591 Q. What did he say to you? A. He said he was going—he wanted me to act as witness to a will.

592 Q. And you observed that Mr. Grout and Mr. Vaughan were discussing it in the cars and showing each other papers there, did you not? A. I did not observe what they were doing or what was said.

593 Q. You did not know that Mr. Vaughan explained something about this to Mr. Grout in the cars going up and exhibited to him the will to which this codicil refers? A. No.

594 Q. Did you know that Mr. Grout had the codicil with him? A. I think I did, because I think Mr.
700 Grout explained to me what was necessary for me to do.

595 Q. But such explanation, such means as were taken to convey to Mr. Fayerweather's mind the meaning and effect of this paper were left to Mr. Grout, and you had nothing to do with that part of it—is that so? A. I had nothing to do with it.

596 Q. And nobody prior to Mr. Fayerweather's signing made any explanation concerning it as you know of, except Mr. Grout? A. Not as far as I know.

597 Q. Did Mr. Fayerweather manifest any impatience when Mr. Grout read the 10th clause of the will? A. I don't recollect it.

RE-DIRECT EXAMINATION by Mr. Bovee:

1 Q. Mr. Browning, you rent a house here, do you not? A. I do.

2 Q. And you are living in that house? A. Yes.

3 Q. The rent of that house being paid for by you? A. Yes.

4 Q. The Judge Bookstaver that you refer to was Judge Henry Bookstaver of the Supreme Court?

Objected to as immaterial and irrelevant.

701

A. Henry W. Bookstaver.

5 Q. And it was while Judge Bookstaver was a Judge of the Court that you were his private secretary for six years? A. Yes, sir.

Same objection.

6 Q. Are you a graduate of college? A. Yes.

7 Q. What? A. Princeton.

8 Q. You had graduated prior to your entering the office of Arnoux, Ritch & Woodford? A. Yes.

9 Q. Prior to the time that there was read to you by Mr. Bovee parts of the testimony of Mr. Grout
702 given at the probate contest, did you make any statement to him in respect to your recollection of the circumstances connected with the execution of the codicil.

Objected to as incompetent and immaterial.

A. I did.

10 Q. What did you say to him then?

Same objection.

A. I stated what I recollected in connection with the signing of the codicil and the events on that day.

11 Q. And in that statement did you embody sub-

stantially the facts that you have testified to affirmatively here in this hearing.

Same objection.

A. Exactly.

12 Q. And that was before you had read or heard read the testimony of Mr. Grout.

Same objection and leading.

703

A. It was.

13. Q. And has the testimony which you have given here in respect to the circumstances and what occurred in the execution of that paper, and what transpired immediately preceding it, been given without your recollection having been refreshed in any way by reference to the testimony of Mr. Grout? A. Absolutely.

14 Q. Did Mr. Grout sign as a subscribing witness to the codicil in the presence of both you and Miss Joyce? A. He did.

15 Q. And after you had both signed. A. After we had both signed.

16 Q. In other words, you all signed in the presence of each other and in the presence of the testator?

704 A. Yes.

18 Q. After Mr. Fayerweather had signed his name? A. Yes.

19 Q. Have you any recollection, Mr. Browning, as to what pen Mr. Fayerweather used in signing his name. What is your best recollection about that? A. My impression is that he used the same pen that we used—Miss Joyce and I used.

20 Q. You have said that Mr. Fayerweather from time to time nodded as Mr. Grout read the codicil. Were those nods given Mr. Browning at an appropriate time

with reference to his intelligence and understanding of the paper himself ?

Objected to as grossly leading.

A. It seemed so to me.

21 Q. Mr. Browning, do I understand you to say that Mr. Fayerweather did not use the expression " pshaw " or that you have no recollection of that ? A. I simply do not recollect it.

705

22 Q. You do not mean to testify that he did not say it ? A. No.

23 Q. You were asked by the counsel for the complainants what other facts you have a more distinct recollection of than the handing of the pen, and when that question was asked it was followed by a continuation of the question which it seemed to me interrupted your answer to that direct question. I ask you now if you have a distinct recollection of the facts occurring at the time of the execution of the codicil of a more distinct character than that of the pen being handed to Mr. Fayerweather ?

706

Objected to as suggestive and leading.

A. I think some other facts are more impressed on my mind than that.

24 Q. Indicate what the facts are in connection with the execution of the paper that you have a more distinct recollection of than Mr. Fayerweather's being handed the pen, Mr. Browning ? A. The fact that I signed myself sitting at that table. That is one of the clearest facts in the whole thing.

25 Q. And the fact that Mr. Fayerweather turned out

of bed in the way that you have testified? A. The fact that he sat up.

26 Q. And the fact that he signed his name? A. The fact that he signed his name, and the fact that the other witnesses signed—I have a distinct recollection because the attestation clause had brought it to my mind that we must sign in the presence of each other. It was my first experience.

27 Q. How about the fact of the codicil being read to him?

707

Objected to as leading.

A. I think I noted that particularly because I was impressed by the care which Mr. Grout used. He always exercised great care in any matter, and he read very carefully and distinctly.

28 Q. And how about the reading of the clause from the will? A. He read the same way from that.

29 Q. And is not that fact more distinct in your recollection than that of his being handed the pen?

Objected to as leading.

708

A. I think it is—of course, it is very hard to characterize some recollections.

30 Q. The fact that Mr. Fayerweather from time to time nodded his head during the reading of this paper—is that more plain?

Objected to as leading.

A. Yes, it is.

31 Q. You were asked if Mr. Grout said certain things coming up in the car and you answered no. Do you mean by that, Mr. Browning, to say that you have no

recollection of that, or that he positively did not say the things indicated in the question? A. Simply that I did not hear him. He conversed with Mr. Vaughan, but I did not hear the conversation.

RECROSS-EXAMINATION by Mr. Sherman:

1 Q. Was it at your suggestion that Princeton College was inserted as a beneficiary under the deed of gift which was executed by the executors after the course of the papers and the proceedings in the Surrogate's
709 Court determined them not to contend that the residuary estate belonged to them? A. No; I didn't know that it was done until after the whole matter was consummated.

2 Q. You go to the orations frequently? A. Very seldom.

3 Q. Did you when you were fresher? A. I may have been to one.

4. Q. Have you observed that the attachments and associations of college life, what is called *alma mater* is with most colleges very strong? A. I think it is.

5 Q. And that there is a certain movement of sentiment connected with it which would naturally dispose any graduate of a college to take a great deal of satisfaction in the possession of the Fayerweather
710 Hall or of a donation of from $100,000 to $2,000,000 out of the estate of Mr. Fayerweather? A. I think we would have appreciated the $2,000,000.

6. Nothing under that? Then the position of *alma mater* is large favors thankfully received and smaller ones in proportion? A. I think that is so to a certain extent.

7 Q. Did you feel any disappointment when Mr. Ritch's efforts to secure an appropriation to Princeton College as a donee under the deed of gift was condemned in the Five College action and failed?

Objected to as incompetent, irrelevant and immaterial.

A. I did not consider it as important. I assume that I was disappointed.

8 Q. Do you remember how much he tried to give Princeton? A. I do not.

9 Q. Was Mr. Grout a graduate of any college? A. I think he was.

10 Q. What? A. Hamilton.

I have read all of the foregoing testimony. Having examined the codicil executed by Mr. Fayerweather on November 15th, my best recollection is that the
711 codicil was signed at Mr. Fayerweather's residence as I have testified on November 15, 1890.

JOHN PRENTISS BROWNING.

Subscribed and sworn to before me this 28th day of March, A. D. 1901, at my office in Aiken, County of Aiken, State of South Carolina.

P. FINLEY HENDERSON,
Notary Public of S. C. [SEAL].

THE STATE OF SOUTH CAROLINA,
County of Aiken,
Office of Clerk of Court,

712

I, JNO. W. DUNBAR, Clerk of the Circuit Court of Aiken County, the same being a court of record, having a seal, do hereby certify that P. Finley Henderson was on the 20th day of January, 1899, ever since has been and now is a Notary Public within and for and residing in said county, duly appointed, commissioned and sworn, and that he has signed the roll kept according to law in this office; having full power and authority by the laws of this State to take the acknowledgment of deeds, and other instruments; also to administer oaths; to take affidavits and depositions out of Court; that

full faith and credit may and ought to be given to his official acts and attestations; that I am well acquainted with his handwriting; that the signature hereto annexed purporting to be his, I believe to be his genuine official signature and that said instrument is executed in accordance with the laws of the State of South Carolina.

In witness whereof I have hereunto set my hand and affixed the seal of the said Court at my office,
713 State and County, this 28th day of March, A. D. 1901.

JOHN W. DUNBAR,
C. C. P. A. C.

714

IN THE CIRCUIT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants,

715 *vs.*

THOMAS G. RITCH *et al.*,
Defendants.

In Equity.

JOHN B. REYNOLDS, as Executor, &c., of Lucy Fayerweather, deceased,
Complainant,

vs.

THOMAS G. RITCH *et al.*,
716 Defendants.

I hereby certify that on the 26th day of March, 1901, before me, P. Finley Henderson, a duly appointed and commissioned Notary Public in and for the County of Aiken, in the State of South Carolina, at my office in Aiken, in the County of Aiken, in the State of South Carolina, pursuant to the notice hereto annexed, between the hours of eleven o'clock in the forenoon and five o'clock in the afternoon, the witness named in said notice, J. Prentiss Browning, appeared, and Roger M. Sherman appeared as counsel for the complainants in

the bill and cross-bill, and C. N. Bovee, Jr., appeared as counsel for the defendants, and said J. Prentiss Browning being by me first duly cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and being carefully examined, deposed and said, as appears by the deposition hereto annexed, taken down by a stenographer pursuant to stipulation entered into herein and hereto annexed. And I further certify that said deposition was then reduced to writing and has been carefully read over and subscribed by
717 the witness, and the same has been retained by me for the purpose of sealing up and directing the same to the Clerk of the United States Circuit Court for the Southern District of New York as required by law, it being impracticable for me to deliver with my own hand into the Court for which it was taken said deposition. That said deposition was retained by me until it was sealed and mailed to the Clerk of said Court. I further certify that said deposition was reduced to writing pursuant to said stipulation and signed by deponent, J. Prentiss Browning, in my presence on the 28th day of March, 1901, pursuant to the stipulation and agreement of the parties by their counsel, at the conclusion of the examination, that the deposition should be written out and signed
718 by the deponent; that the reason why the said deposition was taken was that the said witness lives at Aiken, in the County of Aiken, in the State of South Carolina, more than one hundred miles from New York, the place where said cause is to be tried. And I further certify that I am not of counsel or attorney to either of the parties, nor am I interested in the event of this cause. And I further certify that the fee for taking the said deposition, $67, has been paid to me by defendants, and the same is just and reasonable.

In witness whereof, I have hereunto set my hand and

notarial seal at my office in Aiken, Aiken County, South Carolina, this 28th day of March, 1901.

P. FINLEY HENDERSON,

Notary Public for the County of Aiken, S. C.; my commission as Notary Public expires at the pleasure of the Governor of South Carolina.

THE STATE OF SOUTH CAROLINA,
County of Aiken,
Office of Clerk of Court.

719

I, JNO. W. DUNBAR, Clerk of the Circuit Court of Aiken County, the same being a court of record having a seal, do hereby certify that P. Finley Henderson was on the 20th day of January, 1899, ever since has been, and now is a notary public within and for, and residing in said county, duly appointed, commissioned and sworn, and that he has signed the roll kept according to law in this office; having full power and authority by the laws of the State to take the acknowledgment of deeds, and other instruments; also to administer
720 oaths; to take affidavits and depositions out of Court; that full faith and credit may and ought to be given to his official acts and attestations; that I am well acquainted with his handwriting; that the signature hereto annexed purporting to be his, I believe to be his genuine official signature and that said instrument is executed in accordance with the laws of the State of South Carolina.

In witness whereof, I have hereunto set my hand and affixed the seal of the said Court at my office, State and county, this 28th day of March, A. D. 1901.

JOHN W. DUNBAR,
[SEAL.] C. C. P., A. C.

(Endorsed)—U. S. Circuit Court—Filed Apr. 5, 1901.—John A. Shields, Clerk.

Adjourned to April 18, 1901, at 10.30 A. M.

EDWARD M. GROUT.

NEW YORK, April 18, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. BOVEE, Mr. BLAIKIE, and a representative of Root, Howard, Winthrop & Stimson.

EDWARD M. GROUT, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

721

The Examiner: Suppose you go on, with the right reserved to Mr. Sherman to take an objection to each and every question the same as if he was present.

Mr. Blaikie: I will consent to that.

DIRECT-EXAMINATION by Mr. Bovee:

1 Q. Mr. Grout, what is your business? A. Lawyer.

2 Q. When were you admitted to the bar? A. December, 1885.

3 Q. Where do you reside? A. Brooklyn.

4 Q. What is your firm over there? A. Only myself and brother.

5 Q. Were you at one time associated with Supreme Court Justice Gaynor as partner?

722

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial.

A. Yes, and also Judge Jenks.

Mr. Blaikie: And I move to strike the answer out as not responsive.

6 Q. Do you hold any public office in the City of New York, and if so, what?

Mr. Blaikie: Objected to as immaterial and irrelevant.

A. Unfortunately, yes; President of the Borough of Brooklyn.

7 Q. How long have you been the President of the Borough of Brooklyn?

Mr. Blaikie: Same objection

A. Three years.

8 Q. In November, 1880, were you connected with the law firm of Arnoux, Ritch & Woodford? A. No.

9 Q. In November, 1890?

723

Mr. Blaikie: Objected to as leading.

A. Yes.

10 Q. Did you say when you were admitted to the Bar, Mr. Grout? A. Yes; December, 1885.

11 Q. Were you connected with that office on the 15th of November, 1890?

Mr. Blaikie: Objected to as leading.

A. Yes.

12 Q. And had been for how long? A. I went into that office in November, 1884, and, except for six months from I think the 1st of September, 1887,
724 until the middle of March, 1888, excepting for those six months, I was there continuously from November, 1884, until the first of Jannary, 1893.

13 Q. Were you acquainted, on the 15th of November, 1890, with Daniel B. Fayerweather? A. Yes.

14 Q. How long had you known him? A. Five or six years, more or less, I could not say exactly.

15 Q. To what extent had you seen Mr. Fayerweather in that period of time generally? A. Oh, several times every year, on an average I could not tell; it might be more in one year and less in another.

16. Q. Having business relations with him or otherwise?

Mr. Blaikie: Objected to as leading and immaterial.

A. The office of Arnoux, Ritch & Woodford had business relations with J. B. Hoyt & Company, which was afterwards the firm of Fayerweather & Ladew, and in the course of the business I was frequently assigned to go down there to get a paper executed of one
725 sort or another. I could not say how many times I had seen Mr. Fayerweather, a number of times.

Mr. Blaikie: I move to strike out the answer as not responsive and irrelevant.

17 Q. Did you see Mr. Fayerweather on the 15th of November, 1890? A. I did.

18 Q. Where? A. At his house.

19 Q. What time of the day? A. Along in the afternoon, somewheres between two and three.

20 Q. How did you happen to go to Mr. Fayerweather's house on that day, Mr. Grout? A. General Woodford gave me the last codicil, the fifth codicil, and asked me to see to its execution.

726

21 Q. (Handing paper.) I show you the paper which was marked Complainants' Exhibit 5, January 24, 1901, and ask you whether that is the paper which you refer to as given to you by General Woodford on that day? A. That is the paper.

22 Q. From the time when Mr. Woodford first spoke to you in respect to the matter; proceed, Mr. Grout, and tell in your own way what transpired in respect to the same? A. General Woodford along about noon time, I suppose, twelve or one o'clock, asked me if I could go

uptown to Mr. Fayerweather's house to get a paper executed, a codicil, I think he said, and he told me to take a witness with me. I spoke to the witness Browning and sent him out to get his lunch so that he would be ready, and when General Woodford had written the paper and Mr. Browning had come back, I went to Mr. Fayerweather's house in company with Mr. Browning and Mr. Vaughan. General Woodford had handed me this paper which was in his handwriting. Do you want me to tell in detail what happened at the house?

727

23 Q. First I will ask you by what route you went to Mr. Fayerweather's house? A. The elevated railroad, Third avenue.

24 Q. (Handing papers.) Did you have with you the original will and codicils? A. No, I did not have those papers. My recollection is I did not see those until I got to the house. As I remember, I spoke to Mr. Vaughan on the cars after reading this codicil through, which I did not do until I was on the cars, and seeing its reference to the original will I asked him if he had it, and when we were upstairs in Mr. Fayerweather's house he handed me these other papers, the original will and the first, second and third codicils. Did
728 I speak of this as the fifth codicil?

25 Q. Yes. A. Well, that is a mistake. It seems to be the fourth.

26 Q. Now tell what transpired when you reached the house of Mr. Fayerweather? A. We were admitted to the house; Mr. Browning and myself were shown into the reception room on the main floor, and Mr. Vaughan went upstairs and returned in a few minutes and escorted us upstairs to the second story front room in which there were three ladies, Mrs. Fayerweather, Miss Joyce the elder and Miss Elizabeth R. Joyce, who is one of the subscribing witnesses to this codicil.

27 Q. When you say Miss Joyce the elder, do you mean Anner Amelia Joyce, now Mrs. Reynolds? A. I believe that is the lady; I do not know about her subsequent marriage, except general impression. Mr. Browning and myself were introduced to the ladies; I inquired if Mr. Fayerweather was ready or something of that sort, and on being informed that he was, went into—was shown into the backroom where he was in bed; I think Miss Elizabeth Joyce showed us in, and I think there was something said about Miss Joyce as
729 the other witness; I think there must have been some arrangement at that time; I do not recollect very definitely, but, however, Miss Joyce and Mr. Browning and myself went into the room where Mr. Fayerweather was through the passage between the rooms, not through the hallway. Mr. Fayerweather was lying in a half recumbent position supported with pillows at his back; I spoke to him as I went in; he recognized me and nodded, and I do not remember that he said anything audible for the moment, and he was lying on the side of the bed nearer the window; the bed had its head to one of the side walls so that its side was presented to the windows. I drew a chair up by the side of the bed and read through this entire instrument.

730

28 Q. When you say this entire instrument, what do you mean? A. Referring to the fourth codicil, dated November 15, 1890.

29 Q. Complainants' Exhibit 5 of January 24, 1901? A. Yes, Complainants' Exhibit 5 of January 24, 1901. There is a place here—may I read the codicil to refresh my recollection?

30 Q. Yes. A. There is a place in the codicil which refers to the will, I think—"I hereby confirm the revocation of the tenth paragraph of my said will." I

took the original will then and opened it to that tenth paragraph and read it in part. I did not read it all through, because Mr. Fayerweather interrupted me and said, "Yes, I know," or something of that sort. I then stated the substance of the balance of it without reading the exact words, and then returned to the codicil and read it through, finished reading it, rather, reading the attestation clause as well as the body of the instrument. Miss Joyce had brought pen and ink, or had gotten pen and ink, if it was there, and there was a small
731 table between the bed and the window, and there was a book lying on that; I got that book and Mr. Fayerweather raised himself into a sitting position, turned about so as to throw his feet over the side of the bed, sitting much as one does in a chair, and I handed him the book and he signed the codicil, writing with the book lying on his lap.

31 Q. Signed the paper, Complainant's Exhibit 5 of January 24, 1901, which is now before you? A. Yes Then I drew the table nearer the bed, and having asked the statutory questions as to the execution of the paper, the testator signed it and declared it as his will, or codicil to his will and requested Miss Joyce and Mr. Browning and myself to act as witnesses, the usual statutory questions
732 which are stated in the attestation clause; Miss Joyce signed it, and then Mr. Browning, and then myself.

32 Q. Were Miss Joyce, Mr. Browning and yourself present when Mr. Fayerweather signed his name? A. They were and when I signed also.

Mr. Blaikie: I move to strike out the last clause of the answer as not responsive.

33 Q. And were Miss Joyce and Mr. Browning present when you asked the questions in respect to declaration and publication? A. Miss Joyce, Mr. Brown-

ing and myself were present during the entire execu tion of the paper, as I have stated.

33. Q. And present when each signed? A. When each signed, and when the testator signed, and when I signed.

34 Q. What assistance, if any, was given to Mr. Fayerweather when he raised himself up and turned out of bed in the way that you have indicated? A. None.

733

35 Q. Before he did that what was said by any one suggesting any such thing? A. Suggesting that he rise.

36 Q. Yes, sir. A. Nothing; he rose voluntarily.

37 Q. Was any assistance rendered him while he was sitting up and signing his name by any one? A. None.

38 Q. By whom was he handed the pen? A. I think I handed it to him, and yet, it may be that Miss Joyce did; I would not be sure about that.

39 Q. Was any assistance given to Mr. Fayerweather in the making of his signature? A. None.

40 Q. Did you hold his hand? A. I do not think I ever touched Mr. Fayerweather's hand at any
734 time in my life.

41 Q. Did you hold the pen at all? A. I did not.

42 Q. Did you or did any of the witnesses present at that time have anything to do with the making of the signature of Mr. Fayerweather upon that codicil? A. No, sir.

43 Q. In response to the questions you have said that you asked Mr. Fayerweather, what response did he make? A. He responded in the affirmative, whether by expressly speaking or by nodding his head, I would not be sure, to give sign of assent. He said something at the time he made the signature also.

44 Q. What did he do after he had signed the paper? A. He returned to his position in bed.

45 Q. What assistance, if any, was given to him by any of the parties present in that act? A. None.

46 Q. Was any one else present during the execution of this paper besides the subscribing witnesses to the codicil? A. Not in the room; the others when we came into that room, the other persons, Mr. Vaughan, Mrs. Fayerweather and the elder Miss Joyce, remained in the front room, as we left them, I presume they
735 remained there throughout the whole period because they were there when we came back.

47 Q. Did Mr. Fayerweather or either of the ladies except Miss Joyce go into the room with you to Mr. Fayerweather? A. You mean Mr. Vaughan when you say Mr. Fayerweather there.

48 Q. Mr. Vaughan. A. No, they did not.

49 Q. Did they come into the room while you were there? A. They did not.

50 Q. After the paper had been signed by the subscribing witnesses, what was then done? A. I folded them up and bade Mr. Fayerweather good day and we all returned to the front room, I there endorsed this paper which had been executed, the fourth codicil, as it appears now, except the Surrogate's file
736 mark, and Mr. Browning left just before I had done that, I think, and after I endorsed the paper I gave all the papers to Mr. Vaughan from whom I had received the other originals, and I left.

51 Q. What kind of a pen did you use in signing your name as a subscribing witness? A. I used a pocket fountain pen which I was then in the habit of carrying.

52 Q. Did you use the same pen in writing the endorsement on the paper? A. I did.

53 Q. Was that same pen used by Mr. Fayerweather? A. No.

54 Q. And Miss Joyce and Mr. Browning? A. No, he used a different pen, a pen that was in the house.

55 Q. Was the same pen used by Mr. Fayerweather, Miss Joyce and Mr. Browning? A. Yes, to my recollection.

56 Q. What would you say, Mr. Grout, as to Mr. Fayerweather's being under undue influence at that time?

Mr. Blaikie: Objected to as calling for a conclusion and no foundation laid and incompetent.

737

Mr. Bovee: The statute makes such a witness competent to testify to undue influence and mental incapacity.

A. He was under none that was apparent at the time of the execution.

57 Q. What would you say to his mental condition? A. He to my mind was thoroughly competent and understood what he was doing.

Mr. Blaikie: Same objection.

The Witness: He answered my questions intelligently, he recognized me when I came into the room; he
738 knew without my reading in full what the clause of the will was, and he signed the paper voluntarily without any request; I did not ask him to rise or anything of that sort; he seemed to know when that point came, and when he had made his signature or as he was making it he complained that he was not making a good signature.

Mr. Blaikie: I move to strike out all the answer after "he answered my question intelligently," as not responsive, and including that passage, "he answered my question intelligently."

58 Q. Did you say whom you found in the front room when you returned there? A. I did.

Mr. Bovee: I think that is all. You may cross-examine.

Mr. Blaikie: I will ask the Examiner to suspend the examination about ten minutes. Mr. Sherman is on his way here. He will be here about that time according to my information. He wants to cross-examine him at length; I do not know whether I will examine
739 him at all. As I figure it, he will be here about ten minutes of twelve.

Mr. Bovee: I have one more question to ask Mr. Grout which I think perhaps is covered, but to avoid doubt I will ask it.

59 Q. Was Mr. Fayerweather under any restraint at the time he signed the paper? A. None that was apparent to me, none during the time that I was present.

60 Q. In your opinion was he competent to execute the paper, physically and mentally?

Mr. Blaikie: Objected to as incompetent and immaterial.

740

A. Thoroughly.

61 Q. Was he of sound mind and memory?

Mr. Blaikie: Same objection.

A. In my opinion, yes.

EDWARD M. GROUT.

Sworn to before me this 29th day of April, 1901.

JOHN A. SHIELDS,
Examiner.

Adjourned to April 19, 1901, at 10.30 A. M.

EDWARD M. GROUT.

NEW YORK, April 19, 1901.

Met pursuant to adjournment.

Present—The COMMISSIONER, Mr. SHERMAN, Mr. BLAIKIE, Mr. BOVEE, Mr. FAIN, Mr. CARNOCHAN, and a representative of Messrs. Root, Howard, Winthrop & Stimson.

741

Mr. Bovee: The defendants now read the testimony in chief of the defendant Browning fromthe deposition filed in this court on the 15th day of April, 1901, taken pursuant to notice at Aiken, South Carolina, on the 26th day of March, 1901.

Are you willing to agree upon the record that this testimony shall not be written into the minutes but that the deposition upon file may be used when we make up our printed appeal book, to be regarded as part of the testimony the same as if written out in the stenographer's minutes?

Mr. Blaikie: I know of no objection to that.

[The deposition is printed in Vol. III, p. 274–357.]

742

Adjourned to Monday, May 8, 1901, at 11 A. M.

EDWARD M. GROUT.

NEW YORK, May 8, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. SHERMAN, Mr. BLAIKIE, Mr. PARSONS, Mr. BUTCHER, Mr. SCOTT, Mr. BISHOP, a representative of Nash & Jones, a representative of Root, Howard, Winthrop & Stimson, and a representative of Butler, Notman, Joline & Mynderse.

743

Mr. Bishop: I desire to have it noted that I appear for Amherst and Williams and Union Theological Seminary, pursuant to notice served May 4, 1901, and object to any testimony being taken upon the ground that in the suit of Emma S. Fayerweather and others against Thomas G. Ritch, the record has been made up and is complete as against the defendants named; that in the case of John B. Reynolds as sole executor against Thomas G. Ritch and others, there is no issue joined as to the defendants, the trustees of Amherst College, the president and trustees of Williams College, and that as to the defendant the Union Theological Sem-
744 inary, said defendant has not received any notice of the examination of the witness Mr. Grout in chief.

CROSS EXAMINATION OF EDWARD M. GROUT:

By Mr. Sherman:

62 x-Q. Mr. Grout, how old were you on the 15th of November, 1890? A. I was born on the 27th of October, 1861.

63 x-Q. When last before the 15th of November, 1890, were you in Mr. Fayerweather's company? Did you exchange words with him before that date? A. Oh, yes.

64 x-Q. Frequently? A. Two, three or four times a year in the course of business.

65 x-Q. During what period? A. From I should say in the course of say four or five years prior to that date. I went into Mr. Woodford's office in November, 1884, and perhaps for a couple of years I did not have any business with Mr. Fayerweather at all.

66 x-Q. Well, were your communications with him upon business subjects exclusively? A. Entirely.

745

67 x-Q. And where did such interviews as you had with him occur? A. I think at his place of business.

68 x-Q. Where was that? A. Down here in the swamp somewheres.

69 x-Q. Don't you know where any more particularly than that? A. I could not tell you, I have an idea it was Spruce street, I could not say for sure; it was down in the leather district.

70 x-Q. It may have been Ferry street, may it not? A. I could not tell you.

71 x-Q. You think it was Spruce street? A. I could not tell you

746

72 x-Q. Your best recollection is that it was in Spruce street? A. I have no distinct recollection about his place of business whatever. It was down in the swamp.

73 x-Q. I suppose there is no judicial notice taken of the term swamp. Will you explain a little more definitely what you mean by the term swamp? A. The district east of Broadway in which the leather merchants do business.

74 x-Q. The Court does not judicially know what the boundaries of that district are. Won't you give them? A. I cannot bound it for you. I have not been there for ten years or more.

75 x-Q. You have given us as precise a description of the locality in which Mr. Fayerweather's place of business was as you are able to, have you? A. I think the Court knows where the swamp is.

76 x-Q. I will repeat the question and ask you to answer it? A. It is somewheres in the district known as the swamp, which is devoted principally to the leather business.

77 x-Q. But which is not sufficiently known to you to bound it in any way, is it? A. I could not bound it.

747

78 x-Q. Describe it as accurately as you can? A. It is north of Fulton street, it is some blocks east of Broadway, it is south of the Bridge, and it is west of the East River.

79 x-Q. What was the nature of the business upon which you had occasion to see and talk with Mr. Fayerweather prior to November 15th, 1890? A. The firm of which Mr. Fayerweather was a member, J. B. Hoyt & Company, and its successor firm after Mr. Hoyt's death, Fayerweather & Ladew, were clients of Arnoux, Ritch & Woodford, and from time to time there were papers in suits, papers relating to property and things
748 of that sort which I often went there to get executed.

80 x-Q. Were you a notary at that time? A. I was a notary at that time.

81 x-Q. Were they papers which were required to be deposed to before a notary? A. They were either sworn to or acknowledged.

82 x-Q. Did you have occasion to do anything about them or say anything about them to Mr. Fayerweather except to take his oath or his acknowledgment of them as a notary? A. I could not recall. There must have been some of them that required some explanation.

83 x-Q. Can you recall any that did require explanation? A. No particular papers.

84 x-Q. Can you recall the subject of any of those papers? A. Not other than I have described.

85 x-Q. You do not recall a single topic referred to in those papers? A. Certainly not.

86 x-Q. Were those papers conveyances of property in any case? A. I presume so, I could not recall.

87 x-Q. You have no recollection? A. I have no recollection definitely of any particular paper that was acknowledged in that manner or during that period.

749

88 x-Q. Do you remember any suit in which you took Mr. Fayerweather's deposition upon such paper? A. I do not remember now.

89 x-Q. What is the longest period of time that you were ever in Mr. Fayerweather's presence or company prior to November 15, 1890? A. That I could not tell you. I might add to my answer——

90 x-Q. Would you put any limit on it? A. I might add to the answers to the previous questions, that it is very likely there were papers such as I have described executed in the office when Mr. Fayerweather was there.

91 x-Q. How large an office force did you have
750 then? A. Twenty or twenty-five people.

92 x-Q. How many notaries were there in that office? A. Probably six or eight.

93 x-Q. Well, did Mr. Fayerweather get his views of the necessity and importance of the contents or effect of the papers brought to him by you from you or from some member of the firm? A. I do not know.

94 x-Q. You do not know? A. I do not.

95 x-Q. You have no recollection of having borne such a relation to any business matters which brought you into communication directly with Mr. Fayerweather as enables you to say the nature of it or the part

you bore in it, or whether or not you made any explanations in reference thereto, or what explanations, if any, there were? A. I have no definite recollection, although in the ordinary course of business there would have been explanations, describing papers, and so on.

96 x-Q. But that is a matter of inference from the course of business, and not a matter of recollection, is that so? A. It is so.

97 x-Q. Did Mr. Fayerweather have any conversation with you on any subjects except the papers that
751 brought you together? A. I do not remember any such conversation.

98 x-Q. You do not recall any? A. No.

99 x-Q. Not at any time? A. I do not.

100 x-Q. How large an office force did Mr. Fayerweather appear to have about him when you visited him on these occasions? A. I could not say; he had quite a large establishment there, but it was not all obvious.

101 x-Q. Were there a number of people about? A. There were a number of people in the office, but I do not know how many.

102 x-Q. Could you say how many? A. I have no idea.

752

103 x-Q. Do you remember in what part of the building Mr. Fayerweather's desk was? A. I do not with definiteness; my impression is that it was on the first floor.

104 x-Q. In the rear or in the front of the building? A. That I could not say, I am inclined to think it was in the rear. That is only an impression.

105 x-Q. It is quite likely you may be mistaken about that, is it not? A. I would not be surprised.

106 x-Q. Are you able to say whether you had any dealing with him at all for a year before November 15th,

1890? A. I think likely I had, such as I have described.

107 x Q. Do you remember that you had? A. I do not remember. Such matters as I have described occurred several times on an average each year.

108 x Q. Are you prepared to depose here that you ever saw Mr. Fayerweather in his place of business for a year before the 15th of November, 1890? A. I have no distinct recollection of any particular occasion, but I think very likely that I did.

753

109 x-Q. Do you say that you did positively? A. I do not.

110 x-Q. On any occasion? A. I do not.

111 x-Q. On any occasion within a year before November 15th, 1890? A. I do not name any occasion positively.

112 x-Q. Do you depose that he ever saw you at his place of business within a year before the 15th of November, 1890? A. Not other than I have stated.

113 x-Q. You have no recollection whatever on the subject, is that right? A. No, I have told you what my recollection is.

114 x-Q. Do you know where Mr. Fayerweather was during the year before November 15th, 1890? A.
754 I do not, other than what I have told you.

115 x-Q. Can you state the period or time of the year during any year when, prior to November 15th, 1890, you saw him at his place of business? A. Not further than I have stated.

116 x-Q. You cannot say whether you saw him there in the Spring, Summer, Autumn or Winter? A. Not further than I have stated.

117 x-Q. I understand you to have disclaimed any knowledge of the will of Mr. Fayerweather or the fact that there was a will in the office or being drawn in the

office, or which had been drawn by any member of the firm of Arnoux, Ritch & Woodford in relation to the testamentary dispositions of Mr. Fayerweather down to the 15th of November, 1890, is that right? A. Until General Woodford asked me to take that codicil to have it executed I had no knowledge on the subject.

118 x-Q. You never had any conversation with anybody on the subject prior thereto? A. With no one.

119 x-Q. During the ten days prior to November 15, 1890, Mr. Ritch had never conversed with you
755 on the subject of Mr. Fayerweather's will? A. Never.

120 x-Q. Never alluded to it? A. No, sir.

121 x-Q. Had you seen Mr. Vaughan at the office prior to November 15, 1890, within ten days? A. I did not know Mr. Vaughan until I started to go to Mr. Fayerweather's house with him on the 15th of November.

122 x-Q. And you did not for ten days prior see Mr. Vaughan in the office of Arnoux, Ritch & Woodford? A. I do not know whether I did or not. He may have been in the office without my seeing him.

123 x-Q. But so far as you remember you did not see him in the office? A. He was a stranger to me and he did not attract my attention.

756

124 x-Q. But so far as you remember you did not see him in the office? A. I have no recollection of him at all. He was a stranger to me.

125 x-Q. Now, when Mr. Fayerweather said, "Pshaw, that is a pretty signature for a man to make," or words to that effect, was the codicil still lying on the book on his lap? A. He did not say just those words, but when he spoke about his signature the codicil was there still in his lap, or I was just taking it.

126 x-Q. If those were not the words he used what

words did he use? A. My recollection is that he said, "Oh, pshaw, that is not a very good signature."

127 x-Q. Well, I observe that you qualify that answer with the statement, "my recollection is." Have you now some doubt about the correctness of your recollection upon that point? A. I have no doubt that that is substantially accurate. I would not undertake to state at this date the precise language that he used.

128 x-Q. Can you specify any word of the phrase as to which you have doubt, or where your doubt rests as to its being precisely the language used? A. I
757 have no doubt on the thing; none at all.

129 x-Q. That is not the question. Can you specify wherein your hesitancy about expressing the exact words in my question rests? A. No; I say that at this time I would not undertake to repeat the exact phrase.

130 x-Q. You stated it while the matter was comparatively fresh, in giving your testimony in the Surrogate's Court, did you not? A. I did.

131 x-Q. Do you adhere to your statement of what was said? A. The statement as I then made it was absolutely correct, I think.

132 x-Q. And your doubt now is as to whether you state the exact language used by you in the Surrogate's Court? A. No; I am not trying to give my testimony from the Surrogate's Court but from my own
758 recollection, and ten years have elapsed since that time.

133 x-Q. But at any rate you distinctly remember that Mr. Fayerweather of his own motion drew attention to the —— A. To the poorness of his signature.

134 x-Q. To the defaults in his signature to that codicil? A. No: to the poorness of his signature.

135 x-Q. To the poorness of his signature to that codicil? A. Yes.

136 x-Q. Did it seem to you that it called for criticism in that respect? A. I think it was open to that criticism.

137 x-Q. It struck you that it was not up to his ordinary style of writing, did it? A. Undoubtedly.

138 x-Q. You had seen him write a great number of times, had you not? A. I had seen him write a number of times.

139 x-Q. For the purpose of having him sign papers and swear to them or acknowledge them? A. Probably.

140 x-Q. Well, did you ever go to him except for the purpose of getting his signature to a paper or affidavit?

A. I would not say that I never did for any other
759 purpose.

141 x-Q. But so far as you remember the general purpose, to get his signature? A. I have told you all that.

142 x-Q. And you have seen him write a great many times? A. I have seen him write a number of times; I do not know what you mean by a great many.

143 x-Q. His signature? A. Yes.

144 x-Q. As many as twenty times? A. I do not know.

145 x-Q. As many as ten times? A. Undoubtedly.

146 x-Q. Well, between ten and twenty; at what point do you cease to be exact? A. I would not be exact about it.

760

147 x-Q. You are exact up to ten and are in doubt about twenty? A. I say undoubtedly I saw him write ten. I am not in doubt.

148 x-Q. What you are most familiar with in his writing is his signature, is it? A. Yes.

149 x-Q. Do you remember seeing him write anything but his signature? A. I may have done so. I do not recollect at this time.

150 x-Q. Well, you may have seen him write anything but his signature? A. I do not recall at this time.

151 x-Q. At the time this comment was made by him

on the poorness of his signature you had his signature to his original will in your hand, had you not? A. I believe it was attached to the papers. I had not looked to see. I did not look the papers all over. I looked for a particular clause in the will which was referred to in the codicil.

152 x Q. How were you satisfied that you were reading from his will if you did not see his signature to it? A. I may have glanced over the paper.

761

153 x-Q. Well, how could you tell if you did not look? A. I had the original will, and I undoubtedly did, but not to compare it or look at it closely.

154 x-Q. So that you had an opportunity for observing how much this signature differed from his signature to his original will, did you not? A. I did not stop to compare it at all; I had no occasion to.

155 x-Q. I understand that you deny that you even placed Mr. Fayerweather's pen, while it was in his hand, at the point at which the signature to the codicil of November 15th began? A. I have not been asked to deny it, but I shall.

156 x-Q. Well, have you not denied it? A. I did not touch his pen or his hand.

762

157 x-Q. Did you hand the pen to him? A. Yes.

158 x-Q. You did? A. Yes.

159 x-Q. You touched his hand in doing that, didn't you? A. I doubt it.

160 x-Q. You doubt it. Well, do you say you did not? A. I simply do not remember any such thing as that, Mr. Sherman; it is impossible to remember it.

Mr. Sherman: I move to strike out the statement that it is not important to remember it as not responsive.

The Witness: That is not my statement. I said it was not possible to remember it. I did not say it was not important. I handed him the pen.

Mr. Sherman: I understood you to say it was not important to remember it.

The Witness: Oh, no.

161 x-Q. You thought, and you still think, that Mr. Fayerweather was able to write his name on the 15th of November, 1890, as he was in November, 1884?

763 A. I know he did do it; I am not thinking about it; I saw him do it.

Mr. Sherman: I move to strike the answer out as not responsive, and I repeat the question.

Question No. 161 repeated by the stenographer.

The Witness: That answers your question, unless you change your question.

Mr. Sherman: No; I do not think I have occasion to change it.

The Witness: Will you read the question again?

Question No. 161 repeated by the stenographer.

764

The Witness: I do not say that. That calls for a comparison with 1884, and I know nothing about his signature in 1884. He was able to write in November, 1890, and he did.

162 x-Q. Without any aid from you whatever? A. Absolutely.

163 x-Q. And without any indication from you where the place was at which to begin? A. I simply pointed to the place.

164 x-Q. Where? A. On the paper.

165 x-Q. Well, how near did your finger designate the place? A. It may have been within an inch; it may have touched the paper; I do not remember further; that is, I pointed to the place where the seal was.

166 x-Q. Have you seen the signature to that codicil lately? A. I saw it when I was on my direct-examination here.

167 x-Q. You observe that, contrary to the signatures to the preceding testamentary papers, that is the will and the three codicils in evidence, this signature runs along and upon the seal? A. I noticed that, yes.

765

168 x-Q. Do you remember any fact which will explain that difference between the signature and the place of the signature in the preceding four signatures? A. I do not know anything about the place of the preceding four.

169 x-Q. Have you seen the will and the other codicils? A. I have seen them since.

170 x-Q. Well, you know then, do you not, that none of them run upon the seal? A. I noticed that some of them did not. The only reason that I know of is that the man was in health on the prior occasions and on the 15th of November he was not.

766

171 x-Q. But you still think that he was able to select the place of the beginning of his signature although in fact it runs upon the seal, the signature as completed? A. I only know what he did.

Mr. Sherman: I repeat the questions and move to strike the answer out as not responsive.

Question No. 171 repeated by the stenographer.

The Witness: I have no further answer to make to it.

172 x-Q. Did you, in November 1890, and prior thereto, habitually carry with you a fountain penholder with a gold pen? A. I did at that time, and had for some while, how long I do not remember.

173 x-Q. And it was with such a pen as that with ink from such a penholder that you made any indorsements on the back of the codicil of November 15, 1890, is it not so? A. That is my recollection. My recollection is that I did it in the front room before leaving the house.

767

174 x-Q. Well, are you positive about that? A. I think so.

175 x-Q. Well, what do you mean by that? You say you think you are positive? A. I mean just what I say.

176 x-Q. Do you mean that you are positive? A. I mean just what I say.

177 x Q. And you are unable to state more definitely? A. It is my recollection that before I left the house and in the front room on the second floor I folded that paper and indorsed it, or indorsed it; I think it had been folded before—I indorsed that paper.

768

178 x-Q. Did you sign your own name as a witness to that codicil with the fountain penholder and the gold pen? A. Yes.

179 x-Q. You had previously inquired, had you not, whether there was a pen and ink about? A. I do not remember whether I had made inquiry or whether Miss Joyce had brought it in with her.

180 x-Q. Was it not upon your request and upon your suggestion that Miss Joyce went to find a pen and ink and brought them in? A. I do not know just now

whether it was or not. I know that the pen and ink were there.

181 x-Q. Were there when? A. When the paper was executed. I do not remember whether she brought them in when we went into the room or whether we went out and got them.

182 x-Q. The writing on the codicil was done, was it so far as it was done in Mr. Fayerweather's room on that occasion, by pen and ink which Miss Joyce got, except your signature? A. That is my recollection.

769

183 x-Q. And except the date "15th" in the attestation clause? A. Yes; I wrote that.

184 x-Q. You wrote that and you wrote your own signature with this pen which you carried? A. I wrote what was left in the blank. It is my recollection that General Woodford left a blank in there. I could not tell without seeing the signature.

185 x-Q. (Handing photograph.) There is a photograph of the signatures to all of the papers? A. The word "15th" in the clause of the date is in my handwriting.

186 x-Q. And was written, as your signature was written, with this fountain penholder and gold
770 pen which you carried? A. Yes.

187 x-Q. (Handing photograph.) Here is a photograph of the indorsement on that codicil marked Complainants' Exhibit No. 7, January 24, 1901; that appears to be in your handwriting, does it not? A. Yes; it is.

188 x-Q. And was all the writing there in that indorsement made with the same pen which you carried? A. Yes.

189 x-Q. Have you any objection to now writing the words which appear on the back of that codicil? A.

Not if you deem it of any importance. I do not know how my handwriting compares with what it was fifteen years ago.

190 x-Q. Do you happen to have a pen similar in character now? A. No, I do not carry it now; I think it is lying on my desk at home.

191 x-Q. And you have not supplied yourself with another? A. No; I have dropped the habit of carrying it.

771

192 x-Q. I will ask you to write with such facilities as we have here the words which appear on the back of that codicil, Plaintiff's Exhibit No. 7. Here is a fountain penholder with a gold pen. Was your pen a stub pen or a sharp pointed pen? A. If I remember, it was something betwixt and between; it was not a stub and it was not sharp-pointed.

The Witness: Will you read me those words? I would rather not have them before me as I write.

Mr. Sherman (reading.): On the first line I see here "Fourth Codicil", under that the words "to the", under that "last will and", under that "testa-
772 ment", under that "of", under that "Daniel B. Fayerweather", under that "Dated", and what looks like "Novr."

The Witness: Novr.? I never abbreviated November that way. That is meant for a period; November and a period.

Mr. Sherman: Perhaps it is meant for that. "Nov. 15th, 1890."

Witness writes from dictation.

The Witness: That pen has not quite as broad a point, and the ink does not flow quite as freely I think as mine did.

Mr. Sherman: I think anybody would recognize it. I ask to have it marked as an exhibit:

The paper was marked Complainants' Exhibit No. 1, May 8, 1901, C. B.

193 x-Q. Did you on the way up from the office to Mr. Fayerweather's house, on the 15th of November, 1890, while you were in company of Mr. Vaughan and Mr. Browning, make some statement that it was a case in which you would take particular pains, or
773 words to that effect? A. Something similar to that was a part of the conversation which we had.

194 x-Q. You did not have explained to you at that time the effect of this codicil except so far as it might be spelled out by comparison with the other testamentary papers, did you? A. I did not look at the other testamentary papers, I simply looked at the codicil. I did not see the other testamentary papers until I got to the house.

195 x-Q. When first after you got to the house did you look at the other testamentary papers? A. I received them in the front room.

196 x-Q. Upstairs? A. Upstairs, I think, but my recollection is that I did not examine them until I was in Mr. Fayerweather's room, and then I only
774 opened and looked at the original will, the tenth clause, I think it is, that is referred to in the codicil.

197 x-Q. Then what you did was to read this codicil about to be executed and to examine only such papers as seemed to you to require examination for reference, and to confine that examination to the tenth clause of the will, is that right? A. I think that is all I did. I read the codicil that referred to the tenth clause, and then turned to the tenth clause of the will. Mr. Fayerweather interrupted me, he was impatient——

Mr. Sherman: I am not asking you this, Mr. Grout, and I shall have to ask to have it stricken out.

The Witness: I thought you wanted all that happened.

Mr. Sherman: No, I only want responsive answers to my questions. I move to strike it out. I move to strike out from "Mr. Fayerweather interrupted me" and what follows, as not responsive.

198 x-Q. Had you at that time, Mr. Grout, any knowledge of the fact that Mr. Fayerweather had executed on the 11th of November, 1890, a codicil
775 prepared by Mr. Prescott Hall Butler, wherein he had undertaken to do away with this residuary clause and the disposition of the residuary estate to his executors, and to reinstate the tenth clause of the will of 1884? A. I had not.

199 x-Q. That fact was something you heard of afterwards? A. Yes. I do not say it is a fact, but the report to that effect, I do not know whether it was a fact or not.

200 x-Q. You had no intimation upon that subject until after Mr. Fayerweather's death, had you? A. I had not.

201 x-Q. Either from Mr. Ritch or from Mr. Vaughan or from any one else? A. No.

776

202 x-Q. Had you prior to Mr. Fayerweather's death any intimation or knowledge that on the morning of November 15, 1890, Mr. Fayerweather had had a conversation with Mr. Vaughan embodying instructions for the preparation of a codicil to be executed, and that the outline of the instructions had been taken down on an envelope which Mr. Vaughan had? A. I knew nothing of it.

203 x-Q. You hadn't that codicil of November 11th, I take it, in your possession at that time? A. I never saw it.

204 x-Q. And you were entirely unaware that the codicil which was then executed was in every respect a departure from the instructions said by Mr. Vaughan to have been given him by Mr. Fayerweather on that day, and from the memorandum thereof on the back of the envelope which he says he had?

Mr. Parsons: That is objected to in so far as the question makes statements in the nature of statements of fact.

777

A. I know nothing about it at all.

205 x-Q. When you were in Mr. Fayerweather's room on that occasion he made no inquiry for Mr. Vaughan as to where he was or whether he had returned? A. He did not.

206 x-Q. He made no mention of Mr. Vaughan? A. He did not.

207 x-Q. Did he make any inquiry as to whether the codicil presented by you did not embody the instructions given in the morning? A. He did not.

208 x-Q. Did he make any commentary upon the fact that Mr. Vaughan had placed him in communication with Evarts, Choate & Beaman, and particularly
778 with Mr. Butler, on the 11th of November, and that this codicil was brought to him from the office of Mr. Ritch?

Mr. Parsons: Objected to so far as the question contains statements assuming to be ~~questions~~ statements of fact.

A. He said nothing about it.

209 x Q. Did Mr. Fayerweather wear spectacles or glasses on that occasion? A. I do not think so, but that has never been inquired of me either in the Surrogate's Court or here, and I cannot say with any certainty. I do not think he did.

210 x-Q. Did he have any magnifying lens or use any while you were there? A. I do not think he did. I should have noted that because that is unusual.

211 x-Q. Did he appear to you to be hard of hearing? A. He heard what I said, I do not know whether he was hard of hearing.

212 x-Q. How do you know that he heard what you said? A. Because he answered me.

213 x Q. What answer did he make? A. He interrupted me when I was reading the tenth clause
779 of the will by saying that he knew—"Yes, yes, I know," or something of that sort.

214 x-Q. Well, can you be specific, instead of saying something of that sort? A. That is my best recollection that those were the words.

215 x-Q. What ~~were~~ are the words? A. "Yes, yes, I know"; but at this lapse of time I would not undertake to say with certainty, about the particular words.

216 x-Q. Was his breathing easy or labored? A. He showed some sign of difficulty in breathing; he was a sick man.

217 x-Q. What signs did he show of difficulty in breathing? A. Well, there is only one sign; the breathing was more or less audible, I suppose.

780

218 x-Q. That is the only description that you can give of the difficulty in breathing? A. That is all that I can recall at this time.

219 x-Q. You knew that he was dying of consumption, did you not? A. I knew that he was a consumptive and I knew that he was very ill; I did not know that he was dying; I was astounded when I heard the next day that he had died.

Mr. Sherman: I move to strike out the answer beginning "I was astounded," as not responsive.

220 x-Q. Mr. Vaughan says that when you left the room with Mr. Browning he accompanied you downstairs, is that right? A. Mr. Browning left before I did, he left immediately after the execution, and I think that Mr. Vaughan is right.

221 x-Q. Then did Mr. Vaughan make two trips downstairs? A. I do not know whether he made two trips downstairs or not; it is my recollection that he did not. I think Mr. Browning asked me immediately whether anything else was wanted of him, and I said no,
781 and he departed, and then I endorsed this codicil and gave the papers to Mr. Vaughan, and then I left, and I think Mr. Vaughan did go downstairs to the door with me.

222 x-Q. Did Mr. Bovee have some conversation with you before you were examined in chief in this suit? A. Not specially about this suit; I saw him several times—that is, I do not think I saw him to talk with him except a few minutes before the main examination, and then afterwards I went to luncheon with him, and we came back, and you were not here to cross-examine me.

223 x-Q. Didn't he go to Brooklyn to see you to arrange with you about your giving your testimony before you came here at all? A. No.

224 x-Q. He did not? A. No.

782

225 x-Q. Did you peruse a copy of Mr. Browning's deposition taken in South Carolina before giving your testimony in chief? A. I did, and also my own testimony in the Surrogate's Court.

226 x-Q. Did Mr. Ritch say anything to you before you left the office on the 15th of November to see to the execution of the codicil? A. No.

227 x-Q. You heard nothing from him; it was from Mr. Woodford only? A. Only from Mr. Woodford in relation to this. Mr. Ritch may have spoken to me

about other matters during the forenoon, but I do not recall them.

228 x-Q. Well, did Mr. Ritch know you were going? A. I do not know what he knew; I think likely.

229 x-Q. Did you see Mr. Ritch that day? A. I think so, but I have no definite recollection.

230 x-Q. Either before or after? A. I did not go back to the office that day. I went elsewhere.

231 x Q. Did you see Mr. Ritch after the execution of the codicil that day? A. No; I did not go
783 back to the office.

232 x-Q. And you do not remember whether you saw him before you left the office or not? A. I think likely I saw him; he was a very regular man at the office, and I think he was there that morning.

233 x-Q. Well, do you think that you had some conversation with him on other matters? A. Very likely, but I have no recollection about it one way or the other.

234 x-Q. Have you any reason to think that Mr. Ritch knew that there was to be a codicil executed by Mr. Fayerweather that day prior to the time of your leaving the office? A. I have no reason other than that General Woodford drew the codicil. It is mere inference on my part.

784

235 x-Q. You do not know who set Mr. Woodford in motion? A. I do not.

236 x-Q. You do not know whether Mr. Ritch and Mr. Woodford had any conference that day on the subject before you were called in, do you? A. I do not.

237 x-Q. Were they together that morning before you were sent up to Mr. Fayerweather's? A. I could not say positively. My desk was not in Mr. Woodford's room nor in Mr. Ritch's

238 x-Q. Well, were the doors open from their offices to yours? A. Yes, from Mr. Woodford's office to mine.

If I remember right, I had a room with Mr. Wallace at that time, adjoining General Woodford's, and there was a door that was usually open, but it did not necessarily give me a view of all who came in and out. Mr. Ritch's room was on the other side of the office.

239 x-Q. And for aught that you know Mr. Ritch may have been totally unaware, on the 15th of November, 1890, that there was a codicil of Mr. Fayerweather's that was to be executed? A. I know nothing about it of knowledge.

785

240 x-Q. And you know of no fact which throws light on that subject? A. Not other than what I have told you.

241 x-Q. You did not mention Mr. Ritch's name to Mr. Fayerweather, did you, on the 15th of November, 1890? A. I do not remember at this moment whether he is named in the codicil by name or how.

242 x-Q. Well, waiving that argumentative way of getting at it, do you remember, so far as your memory serves you, did you mention Mr. Ritch's name to Mr. Fayerweather? A. I do not remember. I must have said something introductory when I went into the
786 room, and whether it was that Mr. Ritch or Mr. Woodford had sent me up, I could not say at this time.

243 x-Q. You did not mention any such thing in your testimony in the Surrogate's Court, did you? A. I do not think I was asked such a question.

244 x-Q. And you did not mention any such circumstance during the testimony in the Surrogate's Court, did you? A. I do not think I did; I do not remember; I could not tell you what I said in the Surrogate's Court all of it; it is a good many pages in print.

245 x-Q. Did you tell him he had drawn this codicil, did you tell Mr. Fayerweather he had drawn this codicil? A. I do not remember. As I say to you I must

have said something introductory when I went in the door, and just what that was I cannot recall, whether it was that Mr. Woodford had sent me or that Mr. Woodford had drawn this codicil, I do not remember.

Mr. Sherman? I move to strike out all of the answer of the witness after "as I say to you," as not responsive and incompetent.

246 x-Q. Did you ever see a man die of consumption? A. No.

787

247 x-Q. Did you ever see a man ill from that disease who afterwards died? A. What do you mean by ill?

248 x-Q. Sick with consumption who died from it? A. Well, at what stage of the illness?

249 x-Q. At any stage of the illness that you may recollect? A. Oh, I have seen numbers of people who have had consumption.

250 x-Q. And who died from it? A. I cannot recollect. I have not seen them at the last stages of the disease.

251 x-Q. Well, within what period before the death have you seen any such? A. I do not remember
788 having seen any such person after they were permanently confined to the bed.

252 x-Q. Well, within six months of death—have you seen any one dying of consumption within a period of six months preceding death? A. I have seen people who within six months died of consumption, I do not know whether they were then dying of it or not.

253 x-Q. Well, who died of consumption within six months after you seeing them, is that what you mean? A. Yes.

254 x-Q. Well, you have no remembrance of their appearance, of the outward evidences of their disease? A.

They appeared to have the outward characteristics which to the popular mind——

255 x-Q. Well, instead of requiring us to argue about the popular mind, will you state what symptoms you observed in such persons who died of it within six months? A. Oh, people who are pale, hollow chested, thin, suffering with cough.

256 x-Q. Well, is that all? A. I do not know anything further, I am not a physician.

789

257 x-Q. You have not observed any other symptoms in such person than those you have named? A. I had a young man who left my office this winter who within six weeks died of consumption, but I did not see him when he was confined to his bed.

258 x-Q. Are you a graduate of any college? A. Yes.

259 x-Q. Of what college? A. Colgate, formerly known as Madison in the town of Hamilton, in this State.

260 x-Q. What was your year of graduation? A. 1884.

261 x-Q. How long did you live at Hamilton? A. I was there during the four years of my college
790 course and nearly three years of the academic course.

262 x-Q. Have you been there since? A. Occasionally at commencements. I am one of the trustees of the college. I think I was there at the last commencement for a day. I have been at a number of others.

263 x-Q. Were you there in the summer of 1892? A. 1892--no; the first commencement that I was back at was in 1895, I think, I am very sure. I had been there one spring to some Patron's Day, I think, that was either the spring of 1894 or the spring of 1895, in April, but

the first commencement I was back at I think was the commencement of 1895.

264 x-Q. When you were in Hamilton did you board with a Mrs. Howe? A. Part of the time.

265 x-Q. And were you not in her house in 1891? A. I do not think so, I do not think I was in Hamilton in 1891.

266 x-Q. Are you positive that you were not in Hamilton in 1891? A. I do not recall any occasion when I was there in 1891.

791

267 x-Q. Or in 1892? A. I do not think of any occasion in 1892. I know I was not there in 1892. You refer to commencement period?

268 x-Q. I refer to any time in that year? A. I am very sure I was not there either of those years, unless you can recall some occasion to me. My recollection is the first commencement I went back to was in 1895, and that I had been there before that commencement only once to a Patrons Day, which was in 1894 or 1895, in April.

269 x-Q. Do you know Albion M. Dyer? A. I do.

792

270 x Q. Was he a classmate of yours? A. He was.

271 x-Q. Was he a roommate of yours at Mrs. Howe's? A. Never.

272 x-Q. Did he board at Mrs. Howe's when you did? A. I think he did for a brief period, not during the major part of the time I boarded there.

273 x-Q. Have you within thirty days last past sent him a telegram? A. I have.

274 x-Q. Have you seen him within thirty days? A. I have not.

275 x-Q. Have you had a report within thirty days

from any one who has seen him? A. I have not. I have had a talk with him over the telephone.

276 x-Q. Did you not have a talk with him in the year 1891, at Hamilton, New York? A. I do not recall any such conversation. I do not recall meeting him in 1891, in Hamilton, New York.

277 x-Q. Was he in your office in New York in 1891? A. I do not recall any occasion when he was.

278 x-Q. Did you have a conversation with him in New York City in 1891? A. He for a while
793 was a reporter on newspapers here. Whether he was a reporter in 1891, he was here for a while in 1892, I know, but whether he was in 1891 or whether I saw him, I do not recall.

279 x-Q. Well, do you recall having seen him in 1892? I do not quite understand you. A. He was here in 1892.

280 x-Q. Well, I want to know whether you saw him then and had any conversation with him? A. I remember meeting him on one occasion in December, 1892.

281 x-Q. When did you leave Arnoux, Ritch & Woodford's? A. On the 31st of December, 1892, or the 1st of January, 1893—I think the 31st of December.

282 x-Q. And at that time you had under considera tion a question whether you should enter upon
794 business relations or a partnership with Mr. Gaynor, who has since become a Justice of the Supreme Court, had you not? A. I did not have it under consideration, we had already made the arrangement to take effect on the 1st of January, 1893.

283 x-Q. You say you had already made that arrangement in December, 1892? A. Yes; 1892.

284 x-Q. In December? A. Yes; the arrangement was made on the 24th and on the 26th of December, I think, just before and just after Christmas.

285 x Q. And prior to that time you had that under consideration for some time, did you not? A. Not a great while.

286 x-Q. Don't you recall having a talk with Mr. Dyer about it? A. I remember having a confidential talk with Mr. Dyer about it, and following out his newspaper tendencies he published an article on the subject.

Mr. Sherman: I move to strike out the latter part of the answer as not responsive.

The Witness: That is the only occasion that I can fix Mr. Dyer's presence here in 1892.

795

287 x-Q. It was early in December, 1892, was it not? A. It was not early in December, 1892; my impression is that it was during the holiday week; the whole matter between Judge Gaynor and myself was under consideration only during the last ten days or thereabouts, of the month.

288 x-Q. Well, you call him Judge Gaynor, he was not Judge then, was he? A. He was not. He was elected that year—1893.

289 x-Q. How many years are covered by your acquaintance with Mr. Dyer? A. I think he entered college in the freshman class.

796

290 x-Q. And you have known him ever since? A. Off and on ever since 1880.

291 x-Q. When before this conversation over the telephone with Mr. Dyer did you last see him? A. Not for some years.

292 x-Q. Can you fix the year? A. Somewheres along in 1894, I should judge, 1894, possibly, or in 1895; I met him on the street here in New York City; I do not recall seeing him at any other time since about the Christmas holidays of 1892—1893.

293 x-Q. Prior to the interview with Mr. Dyer in

December, 1892, when did you last see him and converse with him? A. I had not seen him—I had seen very little of him for a number of years, never meeting him except casually, and I do not recall any occasion when I saw him.

294 x-Q. Was he a newspaper man at the time this will contest was going on? A. I do not remember. I think he was in the newspaper business, whether he was here in New York or not I do not know; he has not been in New York continuously since graduation, by
797 any means.

295 x-Q. Do you remember his applying to you from time to time for any information or news in reference to the will contest. A. I do not.

296 x-Q. You do not remember whether that was so or not, is that what you mean? A. I do not remember his making any such application; I do not remember his ever seeing me or speaking about the will contest.

297 x-Q. Did you ever tell him that you were a witness to the codicil made by Daniel B. Fayerweather of New York City, upon the day that he died? A. I do not remember that I ever did.

798

298 x-Q. Did you ever tell him that Mr. Fayerweather at that time was in no condition to resist? A. No, sir; I never did.

299 x-Q. Did you ever tell him that Mr. Fayerweather was so feeble that he was unable to sign the codicil without help? A. Never.

300 x-Q. Did you ever tell him that you guided Mr. Fayerweather's pen as he was not capable of writing without it? A. I never did. It is absurd.

Mr. Sherman: I move to strike out the statement "It is absurd" as not responsive.

301 x-Q. Did you tell him that you found Mr. Fayerweather so weak that he could not write his name without help, and that you assisted him in doing so? A. I did not.

302 x-Q. Did you tell him either those words or any of them, or any of them in substance? A. Never.

799

303 x-Q. Not in the City of New York in 1891, or in 1892, or anywhere else? A. No, sir; never.

304 x-Q. Nor at any other time or place? A. Nor at any other time or place.

305 x-Q. This telephone communication which you have recently had with him, was that sought by him or you? A. I could not tell you.

306 x-Q. Did you call him up or did he call you up? A. I called him up on his stating when and where.

307 x-Q. Well, can you state that more fully so that it may be understood? I do not understand it. A. Yes, I will state it more fully now that you have asked me to. I received a letter from Mrs. Howe who lives in Buffalo, stating that Mr. Blaikie and Mr. Rey-
800 nolds had been there inquiring about me, and a Mr. Middleditch, whom I did not know, and that they had also been to Mr. Dyer——

308 x Q. Have you preserved the letter? A. Yes, I have the letter.

Mr. Parsons: He should be allowed to finish his answer.

Mr. Sherman: I object to the statement of the contents of the letter; the letter should be produced.

Mr. Parsons: I object to any colloquy between counsel and witness, and insist that the witness should go on and finish his answer.

The Witness: And I could not make out from the lady's letter just what the whole thing was about, and I could not understand any such thing, and I thought that Mr. Dyer, being a man, would be able to tell more clearly, and I wrote to Mrs. Howe for Mr. Dyer's address, and on receiving it I telegraphed and asked him to tell me what had occurred during the past ten days about me. I could not understand what it was; and he sent back word that he would tell me face to face or over the telephone, but that he would not write;
801 whereupon I asked when and where I could speak to him, and he replied, and I called him up over the telephone and talked to him.

309 x-Q. You say you have Mrs. Howe's letter? A. I have.

310 x-Q. I will ask you to produce it, if you please? A. Certainly, you may have them.

311 x-Q. Have you kept a copy of the telegrams you have just referred to in your testimony? A. I could not say; if I have not I can make substantially a copy.

312 x-Q. Do you not in your regular course of business preserve copies of telegrams that you send out? A. Telegrams do not always get into the press book, particularly if they do not relate to office business.

802

313 x-Q. Do you know whether this recent one did? A. I do not remember whether it did or not.

314 x-Q. Do you remember whether you have a copy of it or not? A. If I have not I can reproduce it.

315 x-Q. Do you remember whether you have a copy of it or not? A. I do not remember at this moment.

316 x-Q. You selected Mr. Dyer to address on this subject, although he was not mentioned in Mrs. Howe's letter, was he? A. He was mentioned in Mrs. Howe's letter, and therefore I addressed him. She said that Mr. Dyer had also called upon her, and as I could not

see why the inquiries coupled my name with Mr. Middleditch's in connection with the Fayerweather matter I addressed Mr. Dyer to find out.

317 x-Q. And did you receive any other communication from him than that you have stated? A. No.

318 x-Q. Have you had any other communication with him than that you have stated? A. No.

319 x-Q. And that consists of the letter written by you and a telegram, is that right? A. It consists of two telegrams which I sent him and two telegrams
803 which he sent me, and a telephonic communication.

320 x-Q. And from what office did you send the telegrams which you sent him? A. From my office in Brooklyn.

321 x-Q. No; I mean at what telegraph office? A. That I could not say.

322 x-Q. You sent some boy out to the nearest one? A. I gave them to the office boy, and he either took them to the telegraph office or else rang the messenger call and sent them in that manner. I do not know which.

323 x-Q. Well, from what receiving point do your telegrams usually go from your office? A. From the Western Union or the Postal Telegraph Com-
804 pany. I do not know which.

324 x-Q. Well, is it right in your neighborhood there? A. I do not know; I pay no attention to such things.

325 x-Q. Well, what is the name of the boy who sent the telegram? A. His first name is William; I do not know what his last name is.

326 x-Q. He is still in your office? A. He is.

327 x-Q. In your law office? A. Yes, in my law office.

328 x-Q. Do I understand that you sent a letter to Mr. Dyer, or only two telegrams? A. Two telegrams.

329 x-Q. And no letter? A. No letter.

330 x-Q. Will you state the contents of the telegrams as well as you can? A. I think I have already done so.

331 x-Q. Have you undertaken to state the language? A. I have tried to.

332 x Q. I will ask you to state again the language of the two telegrams? A. My first telegram asked him to write me by special delivery exactly what had occurred in Buffalo during the last ten days concerning me, and his reply to that was, "Gladly tell you all either face to face or over the 'phone." My answer was, "Tel-
805 egraph what hour and what 'phone," and he in reply to that gave me an hour, one o'clock, I think, on Saturday a week ago, in the Surrogate's office, Surrogate's Court, in Buffalo, and I reached him, though not at that 'phone. The operator, the Buffalo Central, found him elsewhere, I do not know how.

333 x-Q. Did he tell you that he was prepared to depose to substantially the matter which I have embodied in my questions to you? A. He did not. I will tell you what he did say, if you wish it, and what I said. I do not believe he will swear to any such statement as that.

334 x-Q. You mean, do you, to convey the idea that these questions propounded by me to you in reference to conversations with Mr. Dyer come to you
806 now as a new matter and with surprise, you have not been apprised of that prior to my questions, is that what you mean to convey?

Mr. Parsons: I object to the inquiry of what the witness means to convey. The witness has said that he is willing to state what occurred, and I object to his being asked to put a construction or to state any mental operation in the absence of such testimony.

A. I got Mr. Dyer on the telephone, and after a few personal words of inquiry about himself, and so on, I said, "What is this inquiry that has been made up in Buffalo?" I said, "Who is Middleditch and what is

the inquiry about?" He said, "I do not know much about it." He said, "This man came to me and wanted to know if you had ever talked with me about the Fayerweather will."

Mr. Sherman: I state to you now that this seems to me not to be responsive, and I am going at the proper time to strike it out.

The Witness: You may move to strike it out, but I will state it.

807

Mr. Sherman: I do not mean to interrupt you, but I do not want you to understand that I accept it.

The Witness: And I said, "What did you tell them?" and he said, "I told them we had talked it over some; I couldn't remember a single word that you said." I said, "What is the inquiry about, and who is Middleditch?" He said, "I do not know; I do not know anything about Middleditch." I said, "Now, just what did you tell these men?" He said, "I only told them that I thought I had an impression, but as I told them I could not say a single word that you had said."

808 And I told him that I thought he had better brush up his recollection very carefully before he stated any such thing, because I was prepared to say that he was entirely in error; that no such conversation or no such suggestion of any impression had occurred. When I pressed him finally as to just what he stated he had an impression that I had stated, then at the very end of the conversation he stated what the inquiry actually was; we had been talking nearly ten minutes before he said he had the impression; he could not remember any words at all; that I told him I had the impression that I held Mr. Fayerweather's hand. I told him he was entirely mistaken. I did not know Middleditch,

and that is why I made my inquiry; otherwise I should not have known of the detective work which Mr. Reynolds and Mr. Blaikie seemed to be endeavoring to do. You may move to strike it out if you like.

Mr. Sherman: I move to strike out the answer as not responsive, and I repeat the question.

The Witness: I have nothing further to state.

335 x-Q. Do you decline to answer the question further than you have? A. I do not decline to
809 answer. I simply say that I have answered it.

336 x-Q. You do not answer it otherwise than as you claim to have answered it? A. I think I have answered your question.

337 x-Q. I will ask you to answer the question again. Do you decline to answer it again? A. I will ask Mr. Parsons whether I am obliged to make any further answer.

Mr. Sherman: I ask the Examiner to certify the refusal of the witness to the Court.

Mr. Parsons: If you can answer it differently, answer it differently; if you cannot answer it differently, I insist that your answer stand as you gave it.

810

The Witness: What is the question? I will see if it permits of any different answer.

Question No. 334 repeated by the stenographer,

The Witness: I mean to say that all I knew about it is contained in the answer which I have just made to your question.

338 x-Q. In giving the statement you have given in reference to your statements to Mr. Dyer over the 'phone, have you undertaken to tell all that you said

to him over the 'phone? A. Substantially all; all that I recall.

339 x-Q. And have you phrased it in the language which you used at the time? A. As near as I can. One cannot repeat a ten minutes' conversation over the 'phone with exactness.

340 x-Q. Do you know Marion L. Brown? A. Yes; there is a man of that name who was a classmate of mine. I have not seen him since he graduated, as I remember, in 1884.

511

341 x-Q. Do you know Theodore B. Cauldwell? A. I knew a man of that name.

342 x Q. When did you see him last? A. I do not remember seeing Cauldwell for sixteen years.

343 x-Q. Do you know a man named Aaron H. Cole? A. Yes.

344 x-Q. When did you last see him? A. I do not remember, not more than once or twice since he left college.

345 x-Q. When did you see him most recently? A. I do not think I have seen Cole for five or six years or more, I could not tell.

512

346 x-Q. Do you remember where you saw him last? A. No.

347 x-Q. Do you know Abraham H. Manne? A. I did know him; I have not seen him for a great many years.

348 x-Q. Do you remember when you last saw him? A. I think I may have seen him once since he left college, but I do not think more than that.

349 x-Q. Do you know John G. Patterson? A. There was a man named Patterson in college, but I do not remember whether that was his name.

350 x-Q. Do you know Lorenzo D. Martin? A. Yes.

351 x-Q. When did you last see him? A. I think he was at one college commencement since he graduated; I do not remember which year.

352 x-Q. Do you remember the year? A. No. Mr. Sherman, I am very sure that until the spring, until April of either 1894 or 1895 I was not back to college, and that I was not at commencement either in 1891 or 1892.

813

353 x-Q. You have said that already? A. Well, I did not say that with any positiveness. You recall these names to me and now it brings it back to me.

354 x-Q. Do you know Warren W. Ritch? A. Yes.

355 x-Q. When did you last see him? A. Oh, I saw him perhaps three years ago.

356 x-Q. Where? A. Here in New York.

357 x-Q. Do you know Ambrose D. Dean? A. Yes.

358 x-Q. When did you last see him? A. I do not think I have seen him for three or four years, although he has been in the city here sometimes when I did not see him. Just take the catalogue of my class and I can tell you which ones I have seen.

814

359 x-Q. No, I have left some of them out. Do you know Eugene A. Rowland? A. Yes.

360 x-Q. When did you last see him? A. I think Rowland was down here three or four years ago.

361 x-Q. Do you know John D. Rumsey? A. Yes.

362 x-Q. When did you last see him? A. I think I have seen Rumsey just once since he left college; I am not sure.

363 x-Q. Do you remember Samuel H. White? A. Yes.

364 x-Q. When did you last see him? A. I do not remember ever seeing him since he left college.

365 x-Q. Do you remember Albert J. Truesdale? A. Yes.

366 x-Q. When did you last see him? A. I do not think I have seen him since he left college. I may have seen him once.

367 x-Q. Do you know William L. Swan? A. Yes.

368 x-Q. When did you last see him? A. The same as regards Truesdale; I may have seen him once
815 since he left college, but not more than once.

369 x-Q. Do you know Charles C. Van Kirk? A. Yes.

370 x-Q. When did you last see him? A. Oh, quite recently.

371 x-Q. When? A. I saw him at Albany—he is a practicing lawyer there—I saw him in Albany some time last winter and I have seen him down here. I transacted some business for him this winter; I do not think it was more than two months ago.

372 x-Q. Do you know Edward O. Smith? A. Yes.

373 x-Q. When did you last see him? A. I do not think I have seen him but once since he left
816 college, if I have that; I do not think I have at all.

374 x-Q. You are positive that you were not at Mrs. Howe's during the commencement time of 1892? A. Yes.

375 x-Q. You say you do not know Thomas J. Middleditch? A. I do not recall him. If you will tell me who he was—there were some Middleditches who had been in college before I was there, or one Middleditch, I do not know whether one or more, the name is familiar, and there is somebody who has been there of that name afterwards.

376 x-Q. You say you did not converse with him at Mrs. Howe's in Hamilton, in commencement season

of 1892? A. I would not know the man if I saw him. If he was a man who was at college at the time I was there, I may have met him as I did scores of boys without being able to remember names or faces.

377 x-Q. But that would not make you remember in regard to your being at commencement in Hamilton, in 1892? A. No. Describe the man.

378 x-Q. You are confident that you were not there? A. Tell me who the man is. I am very sure that I was not there in 1892.

817

379 x-Q. And you had no conversation at Hamilton in the commencement season of 1892 with a man named Thomas J. Middleditch, on the subject of the execution of the dying day codicil of Mr. Fayerweather? A. No.

380 x-Q. None at all? A. No.

381 x-Q. You are positive of that? A. I am positive of that. Now, will you tell me who Mr. Middleditch is?

382 x-Q. In good time I will. Don't you remember a family of Middleditch stopping at the hotel and going to Mrs. Howe's at your suggestion, in 1892? A. I do not. I want to tell you positively that I was not in Hamilton at commencement of 1892.

818

383 x-Q. Well, you have said that. I understand that. You say that you did not state to Thomas J. Middleditch in Hamilton, New York, in the summer of 1892, that Mr. Fayerweather had not strength enough to sign the codicil, and that you held the pen? A. I never said that to anybody. I do not know who you mean by Thomas J. Middleditch.

Mr. Sherman: That is all.

EDWARD M. GROUT.

Adjourned to May 27, 1901, at 2 P. M.

C. N. BOVEE, JR.

NEW YORK, May 27, 1901.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. PARSONS, Mr. BOVEE, Mr. SHERMAN, Mr. BLAIKIE, Mr. McLAUGHLIN, a representative of Root, Howard, Winthrop & Stimson, and a representative of Nash & Jones.

819

CHRISTIAN N. BOVEE, Jr., called as a witness on behalf of the defendants, being duly sworn testified as follows:

DIRECT-EXAMINATION by Mr. Parsons:

1 Q. What is your law firm? A. Ritch, Woodford, Bovee & Wallace.

2 Q. How long have you been a member of that firm or of predecessor firms? A. I have been a member of that firm since its organization. I became a member of the predecessor firm of Arnoux, Ritch & Woodford in 1883 or 1884, somewhere about there, and continued a member of the firm of Arnoux, Ritch & Woodford down to the organization of the firm of Ritch,
820 Woodford, Bovee & Wallace.

3 Q. When did you become actively engaged in Fayerweather litigation? A. When the case of Amherst *vs.* Ritch was in the Court of Appeals of the State of New York.

4 Q. Have you been actively concerned in the present suit? A. I have.

5 Q. From its beginning. A. I have.

6 Q. Both in proceedings in court and out of court? A. Yes.

7 Q. Do you remember that at one time there was made in the suit a motion to strike out certain de-

fenses, and if so by whom was the motion made, against whom was it made, and was it argued, and if so when did the argument take place? A. The motion was made by the complainant in the bill and the complainant in the cross-bill to strike out the special plea of the defendant Thomas G. Ritch, one of the executors and trustees under the will of Mr. Fayerweather, upon the ground of his failure to produce and file with the Clerk of this Court the original will and codicils.

That motion was made before Judge Lacombe
821 on the 30th of November.

8 Q. Who represented the motion? A. Mr. Sherman, Roger M. Sherman.

9 Q. Did you participate in the motion and if so what part was taken by you? A. I opposed the motion on behalf of the defendant Ritch and submitted an affidavit of Mr. Ritch and made an argument before Judge Lacombe in opposition to the motion.

10 Q. Was there argued before Judge Lacombe the question of whether the will and codicils were in the possession of Mr. Ritch, and if not in his possession whether he knew anything about them——. A. There was.

822

11 Q. Aside from the fact that they had been originally on file in the Surrogate's Court? A. There was. It was argued that he in a measure was responsible for the custody and care of the will and codicils, and that they had disappeared for some reason, and in the motion it was sought to hold him responsible for their disappearance, and in a sense he was charged with their suppression.

12 Q. What was said by you upon the argument with reference to Mr. Ritch's relation to or knowledge of the codicils?

Mr. Sherman: Objected to as incompetent and immaterial.

A. I stated upon the argument that the affidavit which I filed of Mr. Ritch showed that he had no knowledge of the whereabouts of the papers, that he had made every possible effort within reason to learn of their whereabouts, that he had made thorough and diligent search and had had a search made in his office wherever papers might be found, and that he had
823 had a search made in the Surrogate's office with a view to finding the papers, and that as a result of his investigation and efforts to find the will and codicils he had not been able to find them, and he absolutely did not know where they were or by what means they had disappeared.

13 Q. Was anything said by Mr. Sherman upon the motion of any effort to find the papers in the Surrogate's Court by those whom he represented? A. My recollection is that Mr. Sherman stated that it had been testified by Mr. Marsac, Clerk of the Surrogate's office, that he had made search in the office and could not find the papers, and that Mr. Blaikie, the attorney for the complainant in the cross-bill, had made a search in the Surrogate's office and had been unable to
824 find the papers.

14 Q. Did you at that time have any personal knowledge about the papers, where they were or what had become of them or what had ever been done with them? A. I had not.

15 Q. Did you have any relation to the litigation at the time of the probate contest, I mean any active relation? A. I had none; no other than that of a member of the firm who did not actively participate in the litigation.

16 Q. Did you have any personal knowledge about the filing of the papers or the use of the papers in the probate contest? A. None whatever.

17 Q. What, if anything, was done by you subsequent to the argument of the motion before Judge Lacombe in the way of a further search at the Surrogate's office? A. After the motion was argued and the affidavits and the briefs were submitted to Judge Lacombe, I went to the County Court House—I won't say that it was after the argument or before the argument, it was either immediately before or just after—and I saw Judge Truax. The record in the trial of the case of Amherst *vs.* Ritch disclosed that the will
825 and codicils had been offered in evidence by one of the counsel in the case——

By Mr. Sherman:

18 Q. Mr. Root, was it not? A. Yes, I think it was Mr. Root.

By Mr. Parsons:

19. Q. In the case of Amherst *vs.* Ritch? A. Yes, in the case of Amherst *vs.* Ritch. The case had been in the hands of Judge Truax after the submission for a number of months, and I thought it possible that he might have some of the Fayerweather papers. I went to him and saw him while he was on the bench one day, and told him of the question which had arisen
826 in this court in respect to the whereabouts of the papers, and asked him if he had the original will and codicils or if he could give me any information as to where they were. He said he could not, but possibly some of the papers might have been left in the hands of the Special Term Clerk, and he suggested that I go and see him. I then saw Mr. Smith, the Clerk of the Special Term, I think in Part IV., and had him make a search in his files. I then saw the Clerk who sat in Special Term where Amherst *vs.* Ritch was tried, and had him make a thorough search in his files and boxes of papers. Nothing resulted. They failed to find them. I then went down to the Surrogate's

office and saw Mr. Bonynge, the Chief Clerk of the Surrogate's office, and told him about the disappearance of the papers, the apparent disappearance of them, and the difficulties which had arisen in consequence. I told him of the motion which had been made, and that I desired every possible effort to be made to find those papers at any cost. He said that the records were in the hands of Mr. Marsac, and he suggested that I had better see him. Mr. Marsac was out at that interview, and I asked Mr. Bonynge to see Mr. Marsac and impress upon
827 him my insistence that every effort should be made in that office to find those papers, and that if a search had been made it should be made over again, so that they would be absolutely and positively certain that the papers were not there. I went away——

20 Q. Was it your information that the papers had gone upon file in the Surrogate's office at the time of the probate contest?

Mr. Sherman: I object to that as incompetent, irrelevant and immaterial.

A. I so understood it. It was my information that the papers had been filed by the executors, and the records in the Surrogate's office disclosed that the will and codicils had been on file in that office at one time.

828

21 Q. Did you know anything upon the subject of how they reached the trial of Amherst *vs.* Ritch—did you know anything? A. No; not of my own personal knowledge at all.

22 Q. All you know is what the record discloses? A. That is all.

23 Q. And that is that they were offered in evidence by Mr. Root? A. And the additional fact that there was a receipt in the office signed by the firm of Arnoux, Ritch & Woodford, by John R. MacArthur.

By Mr. Sherman:

24 Q. In the office of the Surrogate? A. Yes; in the office of the Surrogate; that receipt was there.

By Mr. Parsons:

25 Q. Whom did Mr. Root represent in the case of Amherst *vs.* Ritch? A. The plaintiffs, Amherst and others.

26 Q. The five colleges? A. The five colleges.

829

27 Q. Who was Mr. MacArthur who had signed the receipt which was in the Surrogate's office?

Mr. Sherman: Objected to as incompetent and secondary.

A. Mr. MacArthur was a clerk in the office of Arnoux, Ritch & Woodford.

28 Q. This receipt was a receipt purporting to have been given by him at what time?

Mr. Sherman: Objected to as incompetent.

29 Q. At what time, with reference to the trial of Amherst *vs.* Ritch?

830

Mr. Sherman: Objected to as incompetent.

A. I won't be certain about that, Mr. Parsons, whether it was contemporaneous——

30 Q. If you won't be certain, I will waive it. A. I do not remember the date of the receipt.

31 Q. When had you seen this receipt, with reference to the time that you saw Mr. Bonynge, the chief clerk? A. I do not think I saw the receipt until Mr.

Marsac pointed it out to me in my interview that I had with him afterwards.

32 Q. Go on, then, from the point which you had reached by your testimony when you had left with Mr. Bonynge the instructions that a further search should be made? A. I afterwards returned to the Surrogate's office and saw Mr. Marsac. I told him of the motion that had been made and my desire that further search should be made, and that the office should be ransacked, if necessary, to find those papers if they were there. I asked him where he had looked, and
831 he said he had looked through the tin box, the accounting box of the Fayerweather estate, and had not been able to find the papers. I then said, "Mr. Marsac, we are determined that those papers shall be found if they are in this office, if you have to duplicate the search which you made before, and no pains must be spared or expense to find those papers; the executors want them to be found." I asked him where the papers would naturally be, where would be the proper place for them to be, and he indicated among the original wills on that shelf, pointing to a shelf behind him.

33 Q. A place different to the box to which you have referred? A. Yes.

832

34 Q. As containing Fayerweather papers? A. Yes. I understood Mr. Marsac to say that he had a receipt for those papers from Arnoux, Ritch & Woodford. He also said that if those had been returned, as more than a year had elapsed since the will was admitted to probate, he did not think that they would be received by the office in the absence of an order of the Surrogate; that he had looked in the tin box, the accounting box; that he knew the will and codicils were not there. I understood that he reached his conclusion that the pa-

pers were not among the original wills by reason of what he had said, that they would not receive the papers back there in the absence of an order of the Court.

Mr. Sherman: I object to the last statement as not responsive and as incompetent, immaterial and irrelevant, and move to strike it out on those grounds.

The Witness: I then said, "Mr. Marsac, I wish you would look in that bundle of original wills, where that paper should be, now, while I am here." He got down the bundle. I think they were in order of
833 years. And he began to look through. I said, "I wish you would go through from beginning to end of that bundle, so that I will know when we leave here that that paper is not here if it is not." He started and turned over each envelope. He passed through the "F's" and there was nothing there About a quarter of the way through the bundle beyond the F's was the envelope with the Fayerweather will and codicils out of its order, out of its place. I think it was in among the K's, if my recollection is right, instead of among the F's in that bundle. They are arranged in alphabetical order, A, B, C, D, right straight through, and among the K's was the Fayerweather envelope with the will and all of the codicils.

834

35 Q. What became of the papers subsequently? A. They were subsequently taken by me from the files and a receipt given for them.

36 Q. When you say subsequently do you mean on the occasion of this visit to the Surrogate's office or on a later occasion? A. No, sir; on the occasion of this visit to the Surrogate's office when the papers were found. I asked Mr. Marsac to be careful about the care and custody of those papers, and he said he would keep them in the safe, and I understand he did put them in the safe. Subsequently the papers were withdrawn by

me from the files and I have used them in the prosecution of this litigation on a number of occasions.

37 Q. How long subsequently to the finding of the papers was it that they were withdrawn from the Surrogate's office? A. I think that it was upon an occasion shortly before the examination of Mr. Browning, the subscribing witness to the last codicil, at Aiken; about that time I think it was that I withdrew the papers and took them with me to South Carolina, where the witness was examined. I won't be sure when it was,
835 but it was just prior to that; just when it was I do not recall, it may have been some time before.

38 Q. When you directed this search, which proved to be successful, to be made, did you have any knowledge or information upon the subject of the papers being then in the Surrogate's office aside from that to which you have testified? A. Absolutely none.

39 Q. Can you explain in any way, except as inference may be drawn from your testimony, any failure to find the papers on any earlier search for them, if any earlier search were really made? A. I cannot.

Mr. Parsons: That is all.

CROSS-EXAMINATION by Mr. Sherman:

836

40 x-Q. Has your deposition been taken upon your initiative? A. What do you mean Mr. Sherman, by my initiative?

41 x-Q. Can't you answer the question? A. No. I do not understand the question.

42 x-Q. You leave it in doubt whether the search in the Surrogate's office was before or after the argument of the motion before Judge Lacombe to strike out Mr. Ritch's plea. Do you intend that?

Mr. Parsons: I object, that his testimony does not

leave it in doubt; I object to that assumption in the question.

Mr. Sherman: I object to the interruption as improper.

At the request of the witness, question No. 42 was repeated by the stenographer.

A. Before the motion had been made my office had used their utmost efforts to find the papers in the office,
and had had inquiries made in the Surrogate's
837 office, and the affidavit which Mr. Ritch made
and which was prepared by me sought to cover the question of his reasonable efforts to find the papers, and the fact that he did not know where they were and had no knowledge which would facilitate either the complainants or the defendants in finding the papers. The search had been made in the office without consultation with me. My visit to the Surrogate's office was in the nature of a last desperate effort, exhausting the last resource, using every possible effort on my part, going to the very extreme to find the papers. That was immediately after the argument of the motion, and before Judge Lacombe had decided it. I immediately advised Judge Lacombe
as soon as the papers had been found. With
838 respect, Mr. Sherman, to your question as to
whether my examination was upon my initiative, I will say that it was upon my insistence that I should testify in this proceeding in view of the testimony introduced by the complainants wherein it seemed to me the complainants sought to show by implication that when Mr. Marsac found those papers in the bundle I knew that he would find them, and I knew I was absolutely innocent of any knowledge of the whereabouts of those papers, and I insisted that my testimony should be taken. If that answers your first question, why, I am very glad to attempt to answer it.

Mr. Sherman: Now, I move to strike out all of the answer as not responsive, except that part of it which is as follows: "My visit to the Surrogate's office was * * * immediately after the argument of the motion and before Judge Lacombe had decided it."

Mr. Parsons: Counsel for the defense say that they are willing that the part of the answer to which objection is made shall remain or shall be expunged from the record, just as Mr. Sherman wishes.

839

43 x-Q. Upon reconsideration, do you understand what I meant by my first question as to whether your deposition was taken upon your initiative. If you do understand that question, I will ask you to answer that question? A. If I understand the question, it is as to whether I have been examined in this case at my own suggestion and insistence in view of the testimony which has been spread upon the record by the complainants in respect to the finding of the will and codicils.

Mr. Sherman: I will repeat the question again.

Question No. 43 repeated by stenographer.

840

The Witness: If my understanding of the question is correct, I answer it as follows: My deposition is taken at my insistence, and with the approval of Mr. Parsons, in view of the testimony spread upon the record by the complainants, by which testimony, by implication, it seems to me they seek to charge me with the responsibility for returning the papers surreptitiously to the Surrogate's office.

44 x-Q. You conducted the cross-examination of Mr. Marsac, did you not? A. I believe I did examine Mr. Marsac.

45 x-Q. Have you asked him several questions tending to show, and which you intended as tending to show, that either Mr. Blaikie or Mr. Reynolds had surreptitiously returned these papers to the Surrogate's files, did you not? A. The record will disclose what I asked Mr. Marsac on cross-examination. I do not remember what I asked him about.

46 x-Q. Well, you are not prepared now to disclaim having intended by those questions which you then asked, to raise that imputation against Mr.
841 Blaikie and Mr. Reynolds, is it not so? A. I have said that I do not remember what questions I asked Mr. Marsac. The record will disclose what questions were propounded to him upon cross-examination.

47 x-Q. Did you ask Mr. Marsac upon his cross-examination upon that occasion, the following questions, to which he made the following answers:

"26 x-Q. Do you know Mr. William Blaikie?
"A. Yes, sir.
"27 x-Q. Have you on various occasions seen
"Mr. William Blaikie in that office? A. Very
"often, yes.
"28 x Q. On how many occasions before the
"occasion when you found the will and codicils
842 "had you seen Mr. Blaikie in the office in respect
"to the finding of the will and codicils? A. Well,
"I could not say as to that; Mr. Blaikie has been
"in the office probably every week.
"29 x-Q. Every week? A. Yes, pretty near.
"30 x-Q. Had Mr. Blaikie suggested to you that
"you should hunt for that will in the tin box and
"in the accountings? A. In the last proceeding,
"not in this proceeding.
"31 x-Q. No, not in this proceeding? A. In
"the last proceeding, yes, sir.
"32 x-Q. And, pursuant to his suggestion, had

"you hunted in those places? A. Yes, sir, I——
"33 x-Q. Had Mr. Blaikie——
" * * * * * *
"The Witness: I think at that time that I had "the bundle of original wills out for March, 1891, "and he suggested that they might be put back "in there. You know I had a receipt for the will "at that time."

And did you ask that series of questions, Mr. Bovee, with the intention of advancing the implica-
843 tion or imputation that the will and codicils had been put back in the box of wills by Mr. Blaikie instead of by you or some one else?

Mr. Parsons: Counsel for the defense object to the question so far as it suggests the idea that the papers had been put back by Mr. Bovee upon the ground that there is no possible justification for such an assumption; Mr. Bovee's testimony is directly to the reverse, and there is no evidence to the contrary of his testimony.

A. I presume you have read the testimony correctly as it appears in the stenographer's minutes?

Mr. Sherman: There it is (handing book).

844

The Witness: If I asked those questions I asked them for the purpose of eliciting the truth, not for the purpose of casting any reflection or imputation upon anybody other than by the development of the truth.

48 x-Q. But the precise and concrete form of the truth which you intended by those questions to support, as you intended, was that Mr. Blaikie had been instrumental in putting that will and those codicils back where Mr. Marsac, upon your insistence, found them;

is it not so? A. I intended by my examination of Mr. Marsac to repel and rebut the insinuation and implication that the complainants had spread upon the record that I had returned those papers to the files of that court, an implication which was without justification, for which there was no foundation whatever; and in my examination of Mr. Marsac I brought out the fact that Mr. Reynolds and Mr. Blaikie, one of the attorneys in this case, had been repeatedly in that office, searching in that office, in respect to the papers and
845 the Fayerweather will; and if any implication could be drawn from the fact that they had been searching in that office for those papers, why that implication should rest and lie wherever it pleased. My purpose was to bring out the truth and the fact, and nothing but that, and to find out where the will and codicils were.

49 x-Q. And you intended to repel what you considered to be an attack upon you by making a counter-attack upon Mr. Blaikie, did you not? A. If by such counter-attack the will and codicils of Mr. Fayerweather could be found, yes.

50 x-Q. But at the time you made the attack the will and codicils had been found, had they not, and at you instance? A. They had.

846

51 x-Q. Now, did you really think, Mr. Bovee, that Mr. Blaikie had surreptitiously replaced them, or did you enter upon that line of examination merely in self-defense? A. Oh, I did not do it merely in self-defense; I did not consider it essential to my defense that I should enter upon any attack upon Mr. Reynolds or Mr. Blaikie.

52 x-Q. Well, then, do you mean to say that the other alternative was in your mind, that you really believed Mr. Blaikie had put the will and codicils back

in the files so that you might point out to Mr. Marsac that they could be found there? A. Oh, Mr. Sherman, I would not say that I believed any such thing as that at all; I have not said so in this case, and I do not say that I believed at that time that he had put those papers back there.

53 x Q. Well, you meant to insinuate or suggest that he had the same facilities for putting them back there that you had, did you not? A. Quite so.

847

58 x-Q. What? A. Undoubtedly he had, perhaps quite as great facility for knowing where they were as I had. He may have been just as innocent as I was of any knowledge of their existence.

59 x-Q. You think that he could not have been more innocent than you were? A. I am very sure of that.

60 x-Q. You knew that Mr. Ritch had been examined quite at length under the Hamilton College plea more than a year before in the direction of the whereabouts of this will and codicils, did you not? A. I knew by the record that he had been examined; I was not present when he was examined. I was not in the proceeding to

848 which he was a party; it was upon the Hamilton College plea.

61 x-Q. Well, now, Mr. Bovee, do you mean to have it understood that you were not, at the time of the motion to strike out Mr. Ritch's plea, to which motion we have referred, acquainted with the testimony that Mr. Ritch had given on the Hamilton College plea? A. Yes, I was familiar with that testimony, I had read it at that time, myself.

62 x-Q. And had you read it previously to that time? A. I do not think there is any doubt about it, I think I had.

63 x-Q. Well, didn't you read it about the time that it was given, from day to day? A. I think not, because

Mr. Ritch was not a party to that proceeding. It was on the Hamilton College plea only.

64 x-Q. Yes, but you were watching the Hamilton College proceeding, were you not? You say that you were the active counsel in the proceeding for Mr. Ritch? A. Yes.

65 x-Q. And you were watching every phase of it, were you not? A. Very likely.

66 x-Q. From the beginning? A. Very likely.

849

67 x-Q. Well, is it not so? A. I have sought to do so to the best of my ability.

68 x-Q. And if you have failed to see anything it has been by an oversight and not by any intention, is it not so? A. Well, as to when I examined that testimony, Mr. Sherman, I am not prepared to say; I read it at some time, but I do not know when.

69 x-Q. And it was some time near after Mr. Ritch gave it, was it not? A. I do not know.

70 x-Q. Well, reflect a moment and see if you cannot recall that particular fact. A. We sought to intervene in that proceeding, and you fired us out. You said we did not have any standing in that proceeding and thereupon we retired.

850

Mr. Sherman: I move to strike that answer out as not responsive and incompetent and not the mode of proof of the progress of a suit in equity in this Court.

71 x-Q. Mr. Ritch occupies an adjoining office to yours, does he not? A. Yes.

72 x-Q. And he has done so for how many years? A. Oh, a good many, I do not know how many.

73 x-Q, And he comes into your room from time to

time to talk his case over, does he not, and has since it was begun? A. Yes.

74 x-Q. And you consider that you have been kept acquainted very promptly, so far as Mr. Ritch knew it, with the progress of this suit, do you not? A. Yes.

75 x-Q. Was this search in the Surrogate's office to which you have testified made by you at the instance of Mr. Ritch? A. Not at all.

76 x-Q. Mr. Ritch was resisting, and knew that you were resisting for him, the motion to strike out
851 his plea for the non-production of these papers, was he not? A. He was.

77 x-Q. And Mr. Ritch felt under no obligation, so far as you know, to make any special effort to produce the will and the codicils, while you felt that some special effort was proper, is that so? A. That is not so.

78 x Q. Well, the latter part of it is so, is it not, that you felt—— A. Under obligations?

79 x-Q. Yes. Well, if you object to obligations, let us say impelled, you felt impelled to do that, did you? A. As Mr. Ritch's counsel I felt impelled to rebut the charge which had been by him made in this motion, a charge that through his neglect and fault, if that was the charge, the papers had disappeared.

852

By Mr. Parsons:

80 x-Q. You mean against him on this motion, you said by him? A. Against him; yes, sir.

By Mr. Sherman:

81 x-Q. Well, the inference which you afford by your testimony and intend to give out is that the will and codicils were in that box all the time; that they were not found when the search which Mr. Marsac describes was made, because the search only proceeded through the letter F and did not go down to the letter K, and

that if the same diligence had been used previously as that which was used upon your insistence, the will and codicils would have been found before, is it not so? A. You can draw whatever inference you please, Mr. Sherman. The fact was that we found the papers out of their regular place in that bundle. Whether Mr. Marsac had ceased his efforts when he had gone through the Fs in looking through that bundle I do not know, and by reason of his omission to go through the entire bundle failed to find the papers when you had sought to
853 find them or when efforts had been made by the executors previously to find them, I do not know.

Mr. Sherman: I move to strike the answer out as not responsive.

82 x-Q. I do not ask you, Mr. Bovee, what inference I am at liberty to draw but what inference you intend to afford and support by your testimony on that point? A. My testimony is upon the record, and it is not for me to say what inference I draw from that testimony. I only wish to say this, that I do not know why Mr. Marsac had not been able to find those papers. I do not say that he had not looked through the bundle before, or whether he had failed to find them because when he had exhausted the Fs he did not go any further,
884 or that when the papers were returned to the office they had been, through mistake, put among the Ks instead of among the Fs in that bundle. If Mr. Marsac did not go beyond the Fs, naturally he did not find the papers, and he never would have found the papers if he had limited his search to that point.

83 x-Q. But that supposition depends, does it not, upon the inaccuracy of Mr. Marsac's testimony that he on previous occasions had examined all the papers in that box without finding the will and codicils? A. It may be, if Mr. Marsac did make such a search as that.

84 x Q. Well he must have examined them, as you

understand, at a time when they were not there, is it not so? A. He may have examined, I do not know.

85 x-Q. And that when you insisted upon the examination, the examination occurred obviously at a time when they were there, is it not so? A. Yes.

86 x-Q. Well, there must have been some time when they were not there, in view of your receipt for them upon their delivery into your possession, is it not so? A. I presume the receipt correctly showed the fact, that
855 the papers were withdrawn from the office at that time; I have no knowledge of the fact.

87 x-Q. Well, you have no doubt, have you, that they were withdrawn from that receipt, by your office? A. No.

88 x-Q. There is no room for doubt of that, is there? A. I have no doubt.

89 x-Q. Well, then, the inquiry seems to narrow itself to this, as to when and by whom, the will and codicils being in the possession of your firm, they were by it returned to the Surrogate's files. Now, do you know when that was? A. I do not.

90 x-Q. Have you stated all that you said to Mr. Bonynge, the Clerk of the Surrogate's Court, on the occasion to which you have referred? A. I think I did
856 say to Mr. Bonynge that if it was going to incur any additional trouble to the clerks to make a thorough and exhaustive search, we would pay for that extra trouble and the time of the clerks in looking for the papers, or something like that.

91 x-Q. Have you now stated all that you said to Mr. Bonynge on that occasion? I think so; all that I recall.

92 x-Q. Did you file an affidavit of Mr. Ritch upon the motion to strike out his plea which, in the broadest manner, disclaimed any knowledge on his part, and any means of knowledge, as to what had become of the will and codicils? A. That is my recollection.

93 x-Q. And did you also submit an affidavit of Mr. Butcher to the same effect? A. I think so.

94 x-Q. What means of knowledge had Mr. Butcher as to the custody or whereabouts of papers in the possession of this firm of attorneys? A. Well, Butcher was the managing clerk of the office at that time and had participated in the search made in the office and the efforts made to find the papers in the office.

95 x-Q. Were you in the trial of the case before Judge Truax? A. No.

857

96 x-Q. Were you in court during the trial? A. No; I think not.

97 x-Q. Do you know whether, as Mr. Root offered those papers in evidence, they were produced by Mr. Ritch, and after being marked returned to him? A. I do not.

98 x Q. Do you know whether they were, during the trial, produced by Mr. MacArthur for use by Mr. Root and immediately returned to Mr. MacArthur after they were marked? A. I do not know; I was not there.

99 x-Q. Did Mr. MacArthur have any such relation to the business then in hand as would naturally
858 lead to his taking that part? A. Mr. MacArthur was a clerk in the office, and what he had to do with the trial of Amherst *vs.* Ritch I am not able to say.

100 x-Q. Well, don't you know that Mr. MacArthur was charged with such duties towards that trial, including the looking after the record from day to day, and seeing that it was printed and put into the hands of counsel? A. I think MacArthur has told me that.

101 x-Q. What is that? A. I think he has told me that that was practically so.

102 x-Q. Well, it is Mr. MacArthur who appears to haxe signed the firm name to the receipt for the will and codicils, is it not? A. It is in his handwriting.

103 x-Q. Where was Mr. MacArthur at the time this case was commenced? A. I do not know.

104 x-Q. Do you know where he is now? A. I do not. I can tell you where I understand he resides.

105 x-Q. Where? A. In Chicago. When this suit was commenced—will you tell me when it was commenced, Mr. Sherman. I forget.

Mr. Blaikie: June, 1897.

The Witness: I think MacArthur was in Spain or Paris or the Phillipines about that time; he was
859 secretary to the Minister to Spain, and afterwards secretary to the Paris Commission, and then secretary to the Phillipine Commission; it was one of those three places.

106 x-Q. What kind of registers have you been in the habit of keeping in your office? A. Oh, we keep law registers.

107 x-Q. And what occurrences do you deem important enough to enter in your law registers? A. Well, a general brief statement of the proceedings in a case of importance.

108 x-Q. Well, do you know whether or not such an occurrence as the withdrawal of the will and
860 codicils from the Surrogate's files and the giving of a receipt to the Surrogate for them has been entered in your law register? A. I do not know.

109 x-Q. In the effort you made to prepare for this motion to strike out Mr. Ritch's plea, did you examine the law registers to see whether they disclosed any trace of these documents? A. I did.

110 x-Q. Did you see there any entry of the fact that they had been withdrawn upon receipt? A. I did.

111 x-Q. Does that appear in the law register? A. I think so, but I won't be sure.

112 x-Q. What impression did it make on your mind

when this will and codicils turned up upon the search made at your instance and you were thereafter informed that there was a receipt of your firm on file for them not canceled or given up? A. I knew that the receipt had been given before that. The inference or the impression made upon my mind was that the clerk to whom the papers had been returned in the Surrogate's office had put them out of the place in this bundle, among the K's instead of among the F's, and that in the general search which had been made for those papers up to that time
861 the person making the examination had limited his efforts to going through the F's and not going through the entire bundle; it was an innocent mistake; he had returned the papers to the bundle, had dropped them out of their proper place in the alphabetical order, and that all of our trouble may have come from that fact. There was nothing else that occurred to my mind.

113 x-Q. Now, what you have imputed in the answer just made is precisely the inference which you sought to support by your previous testimony, is it not? A. Perhaps so.

114 x-Q. I think you miss the point of my last question, which is intended to bring to your mind as related facts that there was in the Surrogate's box the will and codicils, and there was in the Surrogate clerk's
862 hands a receipt for that will and those codicils given by your firm which naturally would be canceled upon the return of the will and codicils, and the apparent inference that the person who returned the will and codicils had not seen fit to draw attention to their return by demanding the surrender of the receipt.

Mr. Parsons: Objected to by counsel for the defense upon the ground that, as he understands, it is not in the box of the Surrogate's office that the papers were found; it was in the box in which earlier searches were assumed to have been made which did not succeed in finding the papers, the papers not being there.

At the request of the witness, question No. 114 was repeated by stenographer.

A. The will and codicils were not in a box in the Surrogate's office, they were in a tied-up bundle on a shelf in Mr. Marsac's room. The receipt, as I recollect it, was a very brief receipt entered in a register or book, the date of which I do not remember, but I wrote to Mr. MacArthur, among the efforts that I made to find these papers, and sought information from him.

863

Mr. Sherman: Do you think this is responsive, Mr. Bovee?

Mr. Bovee: Well, I will have it go down and you can move to strike it out if you desire. I think it bears upon the question.

The Witness (continuing): That he had returned the will and codicils to the office, he knew nothing about them beyond that.

Mr. Sherman: I move to strike out that part of the answer beginning "But I wrote to Mr. MacArthur," &c., as not responsive, and also because it contains secondary evidence of writings which it is obviously within the power of the witness to produce.

864

115 x-Q. Was there any entry in the register of your firm about the return of the will and codicils to the Surrogate's Court? A. I do not know.

116 x-Q. There was no mention of any such entry in the affidavit of either Mr. Ritch or Mr. Butcher; was there? A. As that they had been returned?

117 x-Q. No mention of any such entry in the affidavits? A. I think not.

118 x-Q. And yet you do not know whether the register in fact contained an entry to that effect? A. I do

not know that it contained any such entry, I have never seen any.

119 x-Q. Have you looked to see it? A. I cannot say that I have looked, Mr. Sherman; others have looked there.

120 x-Q. And you are not prepared to say that the register does not contain an entry of the return to the Surrogate's office of this will and these codicils, is that so? A. From an examination by myself, no.

865

121 x-Q. I think you said that you yourself saw the entry there respecting the withdrawal of the will and codicils upon this receipt, did you not? A. I think so; I won't be sure about that.

122 x-Q. And do you mean to say that having gone so far you did not follow down the entries and see whether anything further appeared to have been done with them according to the register? A. I did not make the examination in the office to find those papers, it was done by the clerks in the office under the direction of Mr. Ritch and Mr. Butcher; I did not spend my time on that matter, Mr. Sherman. The entries in Amherst *vs.* Ritch in the register are very voluminous, and I have an impression that about the time of the
866 receipt signed by MacArthur there was a memorandum in the register somewhere that Mr. MacArthur had taken the will and codicils from the files.

123 x-Q Well, you were confronted with the necessity, on a motion made upon a record aimed at striking out Mr. Ritch's plea, of preparing to rebut the case made on that motion, which included the fact that Mr. Ritch had been examined without results on that subject under Hamilton's plea, were you not? A. I do not think I was confronted with any necessity, because I did not consider there was any danger of the Court granting

the motion, assuming that the will and codicils were not filed. I am still of the same opinion, that if the will and codicils had not been filed the motion would not have been granted. As one of the counsel in this case I was desirous that the will and codicils should be found. It seemed to me that it was quite as important to the executors to find the will and codicils and to preserve them—more so than it was for the complainants to this action. I believe now that we were a good deal more anxious to find the will and codicils at that time
867 and to preserve them at this time than the complainants.

Mr. Sherman: I move to strike the answer out as not responsive and as grossly impertinent in the witness under examination.

124 x-Q. You knew that Mr. Blaikie could not possibly have returned the will and codicils to the files, notwithstanding the intimation in your cross-examination of Mr. Marsac to that effect, did you not? A. I do not know anything of the kind.

125 x-Q. Do you mean to say that you thought that that might be within the possibilities by way of explanation of their being found at the time you caused them to be found.

868

The Witness: What is that question?

Question 125 repeated by the stenographer.

Mr. Parsons: Counsel for the defense object to so much of the question as assumes that Mr. Bovee caused the papers to be found; he was the happy instrument; he had nothing to do with causing it.

The Witness: Mr. Sherman, I do not understand the question.

126 x-Q. You knew that Mr. Blaikie could not have been instrumental in replacing the will and codicils in the file where they were found on your insistence, did you not, and you knew that at the time that you were asking the questions of Mr. Marsac which have that tendency? A. Why, no; I did not know that.

127 x-Q. You knew that Mr. Blaikie at no time occupied any relation towards you or your firm which would have induced you or your firm to part with the possession of the will and codicils to Mr. Blaikie, did
869 you not? A. I have no doubt about that.

128 x-Q. Knowing that your firm had them on a receipt and knowing your relations to Mr. Blaikie, you well knew, did you not, that Mr. Blaikie could not possibly have had them in order to return them to the files? A. I do not know anything of the kind. I do not know that Mr. Blaikie did not take those papers off the files of that office before and returned them.

129 x-Q. How could he have done that? A. It is not for me to say. I am not going—the papers were there on public view in the Surrogate's office.

130 x-Q. Do you mean to say that that is the best answer you can make to the question? A. It is the best answer I do make.

870

131 x-Q. Well, do you mean by that to be contumacious? A. Not at all.

132 x-Q. Do you realize that I am exercising the right of cross-examination of you as a witness? A. I do.

Mr. Parsons: I object to counsel's assuming that this line of examination is cross-examination; he may baptize it by any name he likes, but we object to its being called cross-examination.

Mr. Sherman: I object to the remarks of the counsel as being grossly impertinent and characteristic.

Mr. Parsons: We understand that we are at expense for testimony of witnesses whom we put upon the stand, subject to the qualification that we are only to pay for what is legitimate cross examination, and we call this illegitimate cross-examination, and for that reason we object.

Mr. Sherman: Counsel for the complainants is not conducting this examination with any purpose or desire to receive the commendation or approbation of the counsel for the defendants, and begs to be spared, so
871 far as that is possible, these obvious imper ti nences.

Mr. Parsons: Counsel for the complainants fails to understand the point of the objection. We do approve this examination, by whatever name he calls it. All we object to is to have it called a cross-examination and to be at an expense for it.

Mr. Sherman: Counsel for the complainants states that if the objecting counsel desires to throw any more light than he gave while he was under examination as a witness on the disposition which he has made, or which has been made, on his direction of the funds of this estate, he will be recalled by the complainants for that purpose, and otherwise objects to these state-
872 ments of fact being spread upon the record.

Mr. Parsons: Counsel for the defense leaves this situation in the hope that at some time the Court will pass judgment upon the course adopted in introducing insinuations and misstatements into the record by way of a pretense of examination, whether direct or cross, and has no further reply to make whatever to counsel for the complainants.

At the request of counsel, preceding questions and answers read by the stenographer.

133 x-Q. The only explanation, then, that you can give as to how Mr. Blaikie could have replaced the will and codicils, as insinuated by you in your examination

of Mr. Marsac, is that after your firm had returned the will and codicils to the Surrogates' office, not, however, taking up the receipt, that Mr. Blaikie might then have withdrawn them and subsequently replaced them prior to the time of the search made at your instance which resulted in their being found; is that so?

The Witness: Read it.

Question No. 133 repeated by stenographer.

873 A. I have not said that in my examination of Mr. Marsac I insinuated that Mr. Blaikie had returned the papers to the files. If Mr. Blaikie did return the papers to the files where Mr. Marsac found them, of necessity, he must have withdrawn them from the files at some time after they had been returned by my office.

134 x-Q. Do you mean to be understood that it was feasible for Mr. Blaikie to do that, or that you had any reason to think that it was feasible for Mr. Blaikie to do that when you cross-examined Mr. Marsac? A. I have no opinion about it one way or another; the papers are there in a public office in a bundle; I presume that it was physically possible for somebody to extract

874 those papers from those files and take them away if they so desired at any time.

135 x-Q. Then it was physically possible for you or some clerk in your office to have returned them there without attracting attention, so that the fact would be known only upon such a search as you caused to be made, is it not so? A. I suppose so.

Mr. Sherman: That is all.

C. N. BOVEE, Jr.

Sworn to before me this 10th day of June, 1901.

JOHN A. SHIELDS,
Examiner.

Adjourned to August 15, 1901, at 2 P. M.

NEW YORK, August 15, 1901.

Met pursuant to adjournment.

Present—THE EXAMINER, MR. BLAIKIE, MR. CARNOCHAN, MR. NILES and MR. BUTCHER.

Adjourned without date.

NEW YORK, April 23, 1902.

Adjourned to April 24, 1902, at 1.15 P. M.

875

NEW YORK, April 24, 1902.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. BLAIKIE, Mr. BOVEE, Mr. GOODALE, Mr. CARNOCHAN, and a representative of Messrs. ROOT, HOWARD, WINTHROP & STIMSON.

Adjourned to May 12, 1902.

NEW YORK, May 12, 1902.

Adjourned to May 15, 1902, at 2 P. M.

876

NEW YORK, May 15, 1902.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. BOVEE, Mr. CARNOCHAN, Mr. BLAIKIE, and a representative of Messrs. ROOT, HOWARD, WINTHROP & STIMSON.

Mr. Bovee: Counsel for the defendants reads in evidence the deposition of Hon. Alton B. Parker, taken on the 13th day of May, pursuant to notice, and filed in this court on the 15th day of May, 1902, and opened pursuant to stipulation of the parties. The stenographer will transcribe upon the minutes from the deposition the testimony of the Judge.

UNITED STATES CIRCUIT COURT.

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another,
Complainants,

AGAINST

THOMAS G. RITCH *et al.*,
877 Defendants.

JOHN B. REYNOLDS, as sole Executor of the Estate of Lucy Fayerweather, deceased,
Complainant.

AGAINST

THOMAS G. RITCH *et al.*,
Defendants.

IN EQUITY No. 6675.

878

THE UNITED STATES OF AMERICA,
Northern District of New York,
State of New York,
County of Albany. } ss.:

The examination of witness *de bene esse* on the 13th day of May, 1902, on behalf of the defendants, before me, Thomas Newcomb, a notary public, at Chambers of the Court of Appeals, in the Capitol at Albany, New York, in a certain suit now pending in the Circuit Court of the United States for the Southern District of New York, in the District aforesaid, wherein Emma S. Fayerweather and another are complainants, and John

B. Reynolds, as sole executor of the estate of Lucy Fayerweather, deceased, is a cross-complainant, and Thomas G. Ritch and others, are defendants.

Hon. ALTON B. PARKER, a witness produced on behalf of the defendants, being first duly sworn, deposes and says as follows:

879

EXAMINATION by Mr. Parsons:

Q. Are you Chief Judge of the Court of Appeals of the State of New York? A. Yes.

Q. Prior to becoming such, were you a Justice of the Supreme Court of the State of New York? A. I was.

Q. Were you at one time a member of the General Term of the Supreme Court sitting in the City and County of New York? A. I was.

Q. Was there argued before the Court, at a term when you were a member, the appeal from a Special Term judgment in an action which was heard at Special Term before Mr. Justice Truax, brought by the Trustees of Amherst College and others, plaintiffs,

880 against Thomas G. Ritch and others, defendants, spoken of in this suit as the Five Colleges suit? A. There was; but at this point I desire to enter my most earnest protest against this method of ascertaining what has been decided by the courts. I should deem it to be my duty to refuse to be interrogated on this subject were it not that Mr. Justice Truax has seen fit, mistakenly, I think, to give testimony as to what was decided at Special Term. This course on his part persuades me to give testimony, lest perchance a refusal might be misunderstood.

Q. At what term of the court was the appeal referred to heard? A. May, 1895.

Q. Of what Justices did the term consist? A. Presiding Justice Van Brunt, Justice Follett and myself.

Q. Were you present at the argument, and did you take part in the discussion and the decision in the case? A. Yes.

Q. By which of the Justices was delivered the opinion of the Court? A. Justice Follett.

881

Q. Did you concur in his opinion? A. I did.

Q. Does that opinion contain this passage: "The executors of the testator's widow and two of his heirs at law and next of kin seek to have the residuary clause declared invalid under Chapter 360 of the Laws of 1860, which provides:

"'Section 1. No person having a husband, wife, child or parent, shall, by his or her last will and testament devise or bequeath, to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts, and such devise or bequest shall
882 be valid to the extent of one-half, and no more.'

"The difficulty with their contention is that the widow and heirs released all their interest in the estate for valuable consideration paid to them. This statute was designed for the protection of husbands, wives, next of kin and heirs at law, but it does not in anywise prevent them from releasing to educational corporations the benefits which they might have secured by resisting wills made in contravention of the statute. It is urged that these releases were procured by fraud and undue influence. There is no evidence in the record justifying this contention. The terms of settlement were agreed

on during the controversy in the Surrogate's Court over the probate of the will and codicils, and the widow and heirs were represented in that controversy and in the settlement by distinguished counsel, and acted under their advice. The residuary legatees not having any personal interest in the residuary estate, and the widow and heirs having released all their interest therein, there is no person who is entitled to raise the question that the residuary clause is void under the Act of 1860.

"No person or corporation, except the State in certain cases, can impeach the validity of the dis-
883 position of property by will, unless the contestant, if successful, will acquire some interest under the statutes of descent or of distribution, or as devisee or legatee, in the property attempted to be disposed of by the will; and if the person entitled to contest a will, or some one or more of its provisions, voluntarily and for a valuable consideration, received after the testator's death, with full knowledge of the invalidity of the will, divests himself of all interest in the property attempted to be disposed of by it, he cannot impeach its validity. The judgment should be affirmed, with separate bills of costs in favor of the respondents, payable out of the estate? A. It does.

884

Q. Are the persons referred to as two of the testator's heirs at law and next of kin, the defendants in that action, Mary W. Achter and Emma S. Fayerweather? A. The record so shows.

Q. Is it a fact that upon the argument of the case it was urged before the Court by counsel for them and the executors of the testator's widow, that the releases referred to in the opinion were procured by fraud and undue influences: A. That is my recollection.

Q. Was this urged by their counsel by oral argument as well as by printed brief? A. Yes.

Q. Is it a fact that the subject was considered by the Court, that the record upon the appeal was examined by the Court, and that the Court decided that there was no evidence in the record to justify this contention. A. Yes.

ALTON B. PARKER.

Sworn to before me this 13th day or May, A. D. 1902.

T. NEWCOMB,
Notary Public,
885 Albany County, N. Y.

(For the cross-examination of this witness, see the index.)

886

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another,
Complainants,

AGAINST

THOMAS G. RITCH *et al.*,
Defendants.

887

JOHN B. REYNOLDS, as sole Executor of the Estate of Lucy Fayerweather, deceased,
Complainant,

AGAINST

THOMAS G. RITCH *et al.*,
Defendants.

IN EQUITY No. 6675.

888

I, the above named THOMAS NEWCOMB, a notary public, do hereby certify that pursuant to the notice issued and served in the above entitled action which is hereto annexed, in which action Emma S. Fayerweather and another are complainants, John B. Reynolds, as sole executor of the estate of Lucy Fayerweather, deceased, is cross-complainant, and Thomas G. Ritch and others are defendants, I was attended at the Chambers of the Court of Appeals, at the Capitol in Albany, New York, by John E. Parsons, Esq., and C.

N. Bovee, Jr., of counsel for the said defendants, and no one appearing of counsel for the said complainants, on the day and date hereinbefore stated; that the aforenamed witness, Hon. Alton B. Parker, who was of sound mind and lawful age, was by me first carefully examined and cautioned, and duly sworn to testify the truth, the whole truth and nothing but the truth, and he thereupon testified as is above shown, and that the deposition by him subscribed, as above set forth, was written out by me in the presence of the witness
889 himself and from his statements, reduced to writing by me, and was subscribed by the said witness in my presence, and was taken at the place in the said notice specified, and at the time as set forth; and that all was so done and signed in the presence of the said counsel for said defendants, no one appearing for the complainants.

I further certify that the reason for taking the said deposition was and is, and the fact was and is, that the doponent lives at Albany, New York, more than one hundred miles from the place where the said suit is appointed by law to be tried; that I am neither of counsel or attorney to any of the parties to said suit nor interested in the event of said cause; and that it being impracticable for me to deliver said deposition with
890 my own hand into the Court for which it was taken, I have retained the same for the purpose of being sealed up and directed with my own hand, and speedily and safely transmitted to the said Court for which it was taken, and to remain under my seal until then opened.

As witness my hand and seal this 13th day of May, nineteen hundred and two.

T. NEWCOMB,
Notary Public,
County of Albany,
N. Y.

[SEAL.]

JOHN B. REYNOLDS.

JOHN B. REYNOLDS, recalled for further examination, testified as follows:

By Mr. Bovee:

940 x-Q. (Handing paper.) Will you look at the paper which I now show you and tell me if the signature, J. B. Reynolds, at the bottom of that paper is yours? A. Yes, sir; the signature and all the written matter on it is mine.

891

Mr. Bovee: I ask to have it marked for identification.

The paper was marked Defendants' Exhibit No. 1, for identification, May 15th, 1902, C. B.

Mr. Blaikie: Counsel for complainants and cross-complainant objects to the introduction of the testimony of this witness, Judge Parker, because not given upon legal notice and not complying with the requirements and rules of practice of this Court, and ask to have it kept off of the files, and protests against its introduction at this stage, and also further protests that the examination of this witness as to his reasons for reaching a conclusion in this case or as to anything
892 that moved him to testify as he did are illegal, are contrary to the rules and practice of this Court, are disrespectful to the witness himself—I notice he protests—and being evidence at large in the case it overrules the pleas of all defendants. And further, that nothing drawn out in his testimony justifies such a course upon the part of the defendants. He further objects to his testimony as to what transpired at the argument in the State Court before the General Term in the Five College action as not the best evidence and as incompetent; and further objects to what he attempts to testify as to the contents

of any brief or briefs upon the complainants' side as not the best evidence and as incompetent.

For cross-examination of Chief Judge Parker see Index.

CROSS-EXAMINATION by Mr. Blaikie:

941 x-Q. Mr. Reynolds, a letter has just been offered in evidence here——

Mr. Bovee: Hold on, I object to your examining Mr. Reynolds after he had been excused by me. The case is with me and I have a witness to examine.

893

Mr. Blaikie: I propose to cross-examine him on what you examined him about. Do you object to that?

Mr. Bovee: I supposed that you had no questions to ask Mr. Reynolds.

Mr. Blaikie: I know you did, but you were mistaken. It is immaterial to me when I ask him, but I propose to ask him; that is what I propose, sir.

Mr. Bovee: Well, you can take your course in regard to that. I supposed that you had nothing to say to Mr. Reynolds and I have discharged him. I had entered on my other proof; I will conclude that and then you can go on. I will call Mr. Charles H. Edgar.

894

CHARLES H. EDGAR, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

DIRECT-EXAMINATION by Mr. Bovee:

1 Q. Mr. Edgar, where do you reside? A. 19 Monroe place, Brooklyn.

2 Q. Are you connected with the Woodlawn Cemetery? A. Yes, sir.

3 Q. In what capacity? A. Vice-president.

Mr. Blaikie: Objected to as irrelevant and immaterial.

4 Q. (Handing paper.) Look at the paper which I now show you, Defendants' Exhibit 1 for identification of May 15, 1902, and tell me if you have produced that paper here to-day?

Mr. Blaikie: Same objection.

A. Yes, sir.

5 Q. And where did you take that paper from?

Mr. Blaikie: Same objection.

895

6 Q. From the files of the Woodlawn Cemetery?

Mr. Blaikie: Objected to as leading.

7 Q. Where did you take that paper from, Mr. Edgar?

Mr. Blaikie: Same objection.

A. From the files of the Woodlawn Cemetery, sir.

8 Q. How long has that paper been upon the files of the Woodlawn Cemetery?

Mr. Blaikie: Objected to as incompetent and irrelevant and not the best evidence.

896

A. I cannot answer that, sir, because I do not know.

Mr. Bovee: I offer the letter in evidence.

Mr. Blaikie: Objected to as incompetent, irrelevant and immaterial.

The paper was marked Defendants' Exhibit No. 1, May 15, 1902, C. B.

Exhibit No. 1 is as follows:

CHARLES H. EDGAR.

OFFICE OF WOODLAWN CEMETERY.

STATION L, NEW YORK CITY.

Telephone Calls
Cemetery Office, 110 Mt. Vernon
City Office, 53—18th Street

WOODLAWN, May 29th, 1898.

897

WOODLAWN CEMETERY:

You will please allow no one to enter or repair the tomb of D. B. Fayerweather without an order or assent in writing by me.

Respectfully, &c.,
J. B. REYNOLDS,
Executor of Estate of Lucy Fayerweather.

9 Q. You know that that letter has been on file among the records of the Woodlawn Cemetery, do you not?

Mr. Blaikie: Objected to as incompetent and irrelevant and immaterial and not the best evidence.

898

A. Yes, sir.

10 Q. How long has it been on the files of the cemetery within your knowledge, Mr. Edgar?

Mr. Blaikie: Same objection.

A. To the best of my recollection the letter was brought to my attention some time last fall.

Mr. Blaikie: I move to strike out the answer as not responsive.

Q. At that time it was on the files of the cemetery company?

Mr. Blaikie: Same objection.

A. Yes, sir.

12 Q. Have you any letter or communication on the files of your office purporting to come from Mr. William Blaikie relating to the tomb of Daniel B. Fayerweather?

899

Mr. Blaikie: Objected to as incompetent and immaterial.

At the request of the witness 12 Q. was repeated by the stenographer.

A. I have not to my knowledge seen any original paper from Mr. Blaikie.

13 Q. Is there any paper purporting to be a copy of any paper coming from Mr. Blaikie?

Mr. Blaikie: Same objection.

A. Yes, sir.

900

14 Q. Have you it here?

Mr. Blaikie: Same objection.

A. Not that one; no, sir.

15 Q. Have you any copy of that one?

Mr. Blaikie: Same objection.

A. Yes, sir.

16 Q. Let me see it? A. Here it is.

Mr. Bovee: Witness produces a paper which defendants ask to have marked for identification.

The Witness: Will you allow me to say anything?

17 Q. Anything, Mr. Edgar. A. That letter, I do not know whether it is an exact copy of the copy that we have, because I simply copied it there—this is not to go down, if there is no objection.

Mr. Blaikie: I would sooner have it go down.

The Witness: All right, sir. I simply copied it from the paper that I found there this morning, but whether it is an exact copy I won't swear, it has not been
901 compared; I won't swear that it is an exact copy of the paper that is there.

Mr. Bovee: I ask to have it marked for identification.

The paper was marked Defendants' Exhibit 2 for identification, May 15, 1902, C. B.

18 Q. (Handing paper) Look at the paper which I now show you and tell me in whose handwriting that is?

Mr. Blaikie: Same objection.

A. My handwriting.

19 Q. When was that made?

902

Mr. Blaikie: Same objection.

A. This morning, sir.

20 Q. Made from what?

Mr. Blaikie: Same objection.

A. From the paper that is in the possession of the Woodlawn Cemetery, purporting to be a copy of a letter from Mr. Blaikie.

Mr. Blaikie: I move to strike out that part of the an-

swer commencing with the word "purporting," as not responsive.

21 Q. Do you know where the original of that paper is?

Mr. Blaikie: Same objection, incompetent, and immaterial also.

A. No, sir; I do not.

903

Mr. Bovee: Well, I will offer this paper in evidence.

Mr. Blaikie: The paper is objected to. It is shown by the witness' testimony to be not an original and not the best evidence, and not a correct copy even of any original, and as incompetent, irrelevant and immaterial, and no foundation has been laid for offering it.

The paper reads as follows:

NEW YORK, May 31st, 1898.

CALEB B. KNEVALS, Esq.,
Treasurer of Woodlawn Cemetery,
904 20 East 23rd Street, New York.

DEAR SIR:

You are hereby requested not to deliver the keys of the tomb of the late Daniel B. Fayerweather to any one not bearing a written order for them signed by John B. Reynolds as executor of the last will of Mrs. Daniel B. Fayerweather, deceased, or to permit any alterations or changes in it which shall not first be approved by him in writing, pending the judicial settlement of title thereto now in contest. I learn that parties have recently opened the windows without fastening them

open, and that they have had an architect there to arrange some changes.

Yours sincerely,

WILLIAM BLAIKIE,
as attorney for estate of Lucy
Fayerweather, deceased.

CROSS-EXAMINATION by Mr. Blaikie:

905

22 x-Q. Who brought that to your attention last fall, that letter, sir: that first letter? A. I do not remember, Mr. Blaikie.

23 x-Q. State the circumstances, as fully as you can? A. My best recollection is that Mr. Blaikie and Mr. Reynolds called upon me, as an officer of the Woodlawn Cemetery, to obtain some information in reference to the date of the interment of the remains of Daniel B. Fayerweather in the tomb, and looking up the records and the memorandums, this letter was brought to my attention. That is my best recollection of the first time I saw it.

24 x-Q. By whom? A. Well, I could not say that Mr. Blaikie; I do not know who it was, whether
906 it was one of the clerks, or simply a memorandum there in the office.

25 x-Q. What was the date of the interment? A. I do not remember that, sir.

26 x-Q. As nearly as you can tell, what was it? A. I could not say, sir; I have so many of them that I could not say.

27 x-Q. Do you know what action, if any, the directors and managers of the cemetery took upon either of those letters; upon the receipt of either of those letters? A. I do not know, sir.

REDIRECT-EXAMINATION by Mr. Bovee:

28 RD-Q. At the same time that Mr. Blaikie and Mr. Reynolds called upon you, as you have testified, was this other letter or copy of a letter purporting to have been signed by William Blaikie brought to your attention? A. Either at that time or a short time afterwards. That was the way it was brought to my attention, his asking about the dates, and I looked it up and found these letters.

907

29 RD-Q. And were these two letters shown to Mr. Blaikie at that time? A. No, sir; not to my recollection. I do not remember showing them to him.

CHARLES H. EDGAR.

Subscribed and sworn to before me this 10th day of June, 1902.

JOHN A. SHIELDS,
Examiner.

Mr. Bovee: In answer to the objection of counsel for the complainants to the reading of the deposition of Judge Parker, the defendants read in evi-
908 dence the notice of taking deposition of Judge Parker, with admission of service of the same, signed by William Blaikie, solicitor for Reynolds; and also the affidavit of service of said notice on Roger M. Sherman, solicitor for the complainants, attached to the deposition, showing that such notice was served upon said Blaikie and Sherman on the 7th day of May, 1902, at their offices in the City of New York, the deposition being taken on the 13th day of May, six days afterwards, and that that is reasonable notice as required by the statute. Defendants object and protest against there being spread upon the record the specific objections made by the counsel for

the complainants, upon the ground that counsel for the complainants saw fit not to attend the examination of Judge Parker, and thereby waived all objections to the taking of such testimony, except such as might be urged upon a motion to suppress the deposition, and no such motion has ever been made.

Mr. Blaikie: Counsel for complainants calls attention to the fact that upon the back of this deposition the admission of service, instead of being as was stated by him to myself in his letter, an admission of
909 due and timely service is entirely free from any such statement or admission, and simply reads: "A copy received, William Blaikie, sol. for Reynolds." That there is no admission of it being either due or timely, that it was not received —being to take the deposition of a witness more than a hundred miles from the City of New York --within the time required by the Revised Statutes of the United States for the taking of such deposition; that due notice was given to Mr. Bovee, attorney for certain of the defendants, on the day before said deposition was taken that the counsel for the complainants would be actually engaged before the Appellate Division of the Second Department on the day named for the taking of this deposition, the 13th instant, and
910 that he asked of Mr. Bovee an adjournment until to-day at the same hour, and he then would be able to attend, and Mr. Bovee refused his request and proceeded to take the deposition without any one representing the estate of the widow or the next of kin, and that no due or reasonable opportunity has been afforded the complainants and cross-complainant to cross-examine this witness or to protect their interests in the matter.

The papers last offered by Mr. Bovee are as follows:

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another,
Complainants,

911 AGAINST

THOMAS G. RITCH *et al.*,
Defendants.

In Equity.
No. 6675.

JOHN B. REYNOLDS, as sole Executor, &c.,
Complainant,

AGAINST

THOMAS G. RITCH *et al.*,
Defendants.

912

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York,
County of New York, } ss.:

CHRISTOPHER G. REARDON, being duly sworn, says: That he is a clerk in the office of Ritch, Woodford, Bovee & Wallace, solicitors for the defendants in the above entitled action. That on the 7th day of May, 1902, between the hours of five P. M. and six P. M., at No. 150 Nassau street, in the Borough of Manhattan, New York City, he served a notice, of which the annexed

a copy, on Roger M. Sherman, solicitor for the complainants, by depositing the same duly enclosed in a sealed wrapper duly directed to the said Roger M. Sherman, in his office letter box, said office being at that time closed, and there being no person in charge thereof. Deponent further says that he is over the age of fourteen years.

CHRISTOPHER G. REARDON.

Sworn to before me this 10th day of May, 1902.

913

HENRY SILLCOCKS,
[SEAL.] Notary Public (43),
Kings County.

Certificate filed in New York Co.

914

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another,
Complainants,

AGAINST

915 THOMAS G. RITCH *et al.*,
Defendants.

In Equity.
No. 6675.

JOHN B. REYNOLDS, as sole Executor of the estate of Lucy Fayerweather, deceased,
Complainant,

AGAINST

THOMAS G. RITCH *et al.*,
Defendants.

916

You will please take notice, that the defendants herein will take the testimony of Hon. Alton B. Parker, who resides at Albany, New York, more than one hundred miles from any place at which a Circuit Court of the United States for the Southern District of New York is appointed to be held by law, at the final hearing, for use on behalf of the defendants before Thomas Newcombe, Esq., a notary public, who is not of counsel nor interested in this case, at Chambers of the Court of Appeals, in the Capitol at Albany, New York, on the 13th day of May, 1902, at 11:30 o'clock in the forenoon, and thereafter from day to day as the taking of the

deposition may be adjourned ; and that the defendants herein will take the testimony of Hon. Charles H. Van Brunt, who resides at Adirondack, Warren County, New York, more than one hundred miles from the place of trial herein, and more than one hundred miles from any place at which a Circuit Court of the United States for the Southern District of New York is appointed to be held by law, at the final hearing, for use on behalf of the defendants, before James A. Skiff, Esq., a notary public of Warren County, who is not of counsel nor interested in this cause, at the home of said Hon.
917 Charles H. Van Brunt, at Adirondack, Warren County, New York, on the 14th day of May, 1902, at 11 o'clock in the forenoon, and thereafter from day to day the taking of the deposition may be adjourned, and such testimony will be so taken in accordance with the provisions of Sections 863, 864 and 865 of the Revised Statutes of the United States and the Equity Rules.

Dated New York, May 7, 1902.

RITCH, WOODFORD, BOVEE & WALLACE,
Solicitors for Defendants Ritch *et al.*
Office and Post Office address,
18 Wall Street,
Borough of Manhattan,
918
New York City.

PARSONS, SHEPARD & OGDEN,
Solicitors for Defendants Bulkley and Vaughan.
Office and Post Office address,
111 Broadway,
Borough of Manhattan,
New York City.

To ROGER SHERMAN, Esq.,
Solicitor for Complainants Fayerweather *et al.*

WILLIAM BLAIKIE, Esq.,
Solicitor for Reynolds, as Executor, &c.

JOHN B. REYNOLDS, recalled for cross-examination, testified as follows.

By Mr. Blaikie:

942 x-Q. Mr. Reynolds, a letter signed by you, dated May 29, 1898, has this afternoon been offered in evidence here? A. Yes, sir.

943 x-Q. Do you recall that letter, Mr. Reynolds? A. I do.

920

944 x-Q. Do you remember writing it? A. Yes, sir.

945 x-Q. State the circumstances.

Mr. Bovee: We object to it as irrelevant and immaterial.

A. The title to this tomb was one of the several considerations which the executors had agreed to give Mrs. Fayerweather to secure her release to the estate; her interest in the estate. It was not completed when Mr. Fayerweather died ——

946 x-Q. You mean the tomb was not completed? A. The tomb was not completed when Mr. Fayerweather died, although it was planned by him and made
921 with receptacles for himself, his wife, and his wife's sister, now Mrs. Reynolds.

947 x-Q. Mrs. J. B. Reynolds? A. Mrs. J. B. Reynolds. The executors did not fulfill their agreement with Mrs. Fayerweather to convey that property. While Mr. Fayerweather's remains remained in the receiving vault they could have done so, and fulfilled their part of that agreement. They neglected to do so, and, having found themselves in that predicament, caused to be sent to her the deed which Mr. Fayerweather had of the Woodlawn Cemetery into him—from the Woodlawn Cemetery into him. That was the condition of affairs when Mrs. Fayerweather died. She

never knew but what she had a good title to that tomb. The tomb was completed under the care of the executors——

Mr. Bovee: Defendants object to——

Mr. Blaikie: Let him finish his answer.

Mr. Bovee: But I wish to state an objection upon the record.

Mr. Blaikie: Your time will come; just let him complete the answer.

921

Mr. Bovee: You have asked your question in such a way as to permit him to testify as to matters which the defendants could not possibly have any knowledge or supposition of. We object to it as incompetent.

Mr. Blaikie: You will have abundant opportunity to object at the proper time, when the question is answered. Go on with your answer, Mr. Reynolds.

At the request of the witness, the last question and answer read by stenographer.

Mr. Bovee: Add to my objection that it is incompetent.

922

948 x-Q. Have you anything to add to that, Mr. Reynolds? A. Yes, sir, a good deal.

949 x-Q. Go on?

Mr. Bovee: Same objection, incompetent, irrelevant and immaterial, and as calling for the opinion of the witness as to matters not within his personal knowledge.

950 x-Q. Now proceed.

Mr. Bovee: Same objection.

A. They neglected to give it the proper care in its completion, and the water has been running through the joints of the masonry, freezing in winters, ever since. When the judgment of the State court was rendered, without saying anything to parties representing the widow, they had incorporated into the judgment a provision that the tomb should be conveyed to Mrs. Beardsley, one of the nieces of Mr. Fayerweather; also that $25,000 should be appropriated, or such part of it as was necessary, if I remember right, to put the
923 tomb into proper condition to protect the remains of Mr. Fayerweather and Mrs. Fayerweather; with the $2,000 out of it to be left to the cemetery as a permanent fund for keeping the tomb in repair, and the lot. I tried every means, by correspondence and personal interviews with Mr. Ritch, to have him agree with me on some basis by which that very much needed work might be done without heaping upon the memory of Mrs. Fayerweather further disgrace and further disgrace upon the cemetery, because it has been such for many years and is to-day. I could not get any consideration from Mr. Ritch, representing the executors, or any suggestion which would permit me to have any voice at all in the plans of the tomb. I would have been willing to do almost anything to suc-
924 ceed in getting a proper rebuilding of the tomb. I did not feel that Mr. Ritch, Mr. Vaughan or Mr. Bulkley was qualified in a business way by their experience to say what should or should not be done. My experience had been for many years in that line of work, and I was well qualified to repair it as it should be repaired. Mr. Ritch well knew that fact, but from personal feeling was willing to let the remains of Mr. Fayerweather remain, and Mrs. Fayerweather, in this disgusting manner up to the present time rather than consent that I should have any voice in making the proper repairs.

951 x-Q. You mean that you were engaged in what

business to qualify you to know how to repair this tomb, for years?

Mr. Bovee: Counsel for the defendants moves to strike out the entire testimony of the witnes as speculative, as purporting to be testimony of facts of which the witness has absolutely no knowledge whatever, as hearsay and as entirely incompetent.

(Question repeated.)

925

Mr. Bovee: Objected to as incompet[illegible] irrelevant and immaterial, and not within any issue [illegible]aised by the special pleas.

952 x-Q. What business?

Mr. Bovee: Same objection.

A. I based my former remark upon personal conversations with Mr. Ritch and correspondence, of which I have copies, and the original letters from him. The business experience which I refer to was for ten or fifteen years in the quarrying and manufacturing of all kinds of marble for tombstones.

926

Mr. Bovee: Defendants move to strike out the first part of the answer in which the witness refers to correspondence, as the correspondence is the best evidence of what passed between Mr. Ritch and the witness, and as not responsive to the question.

953 x-Q. Was the title ~~of~~ to this tomb ever made over to either the widow of Daniel B. Fayerweather or to her legal representative or either of them?

Mr. Bovee: Defendants object to the question as call-

ing for the opinion and conclusion of the witness, and not for a fact.

954 x-Q. Or to her heirs at law or either of them?

Mr. Bovee: Same objection.

A. I have never seen any conveyance of it or heard of offer of it to them or to any of their representatives.

955 x-Q. You are her sole legal representative, are you not?

927

Mr. Bovee: Objected to as incompetent and calling for the conclusion of the witness.

A. I am the only executor of Mrs. Fayerweather.

Mr. Blaikie: I think that is all, Mr. Bovee.

RE-DIRECT-EXAMINATION by Mr. Bovee:

956 RD-Q. This letter signed by you was sent by you to the Woodlawn Cemetery at about the time of its date, was it not?

Mr. Blaikie: Objected to as immaterial and incompetent.

928

A. My impression is that it was written in their office on their paper.

957 RD-Q. And delivered to them on the date that it bears?

Mr. Blaikie: Objected to as incompetent and immaterial.

A. I should think probable.

958 RD-Q. That is your best recollection, is it not?

Mr. Blaikie: Same objection.

A. Yes, sir.

959 RD-Q. Did you know of a letter being written and sent to the Woodlawn Cemetery by Mr. Blaikie, your attorney, on the 31st of May, 1898, two or three days after your letter was written?

Mr. Blaikie: Same objection.

A. I have no recollection of it except the refreshing of my memory by what purported to be a copy of it here to-day. I think it is quite probable that I
929 asked him to write such a letter.

960 RD-Q. That you asked him? A. I think it is quite probable that I did.

961 RD-Q. Is it not your best recollection that you did suggest to him to write such a letter about that time?

Mr. Blaikie: Same objection.

A. Without refreshing my memory by what has taken place here to-day I should have thought that I did not.

962 RD-Q. But your memory being refreshed by what you have been shown here to-day on Mr. Edgar's examination, are you not able to say that according
930 to your best recollection such a letter was written about that time by Mr. Blaikie?

Mr. Blaikie: Same objection.

A. I should think probable that some such letter was written at my request.

963 RD-Q. It was your intention then that some such letter should be sent by Mr. Blaikie, was it not?

Mr. Blaikie: Same objection.

A. I cannot say what my intention was any more than the fact that I see such an act was probably done.

I do not think he would have written it without consulting me in regard to it.

964 RD-Q. Do you know what has become of the original letter which Mr. Edgar referred to?

Mr. Blaikie: Same objection.

A. I have never seen it since it was written, and I could not say that I saw it then.

965 RD-Q. You do not know how it got off the files then, of the cemetery company?

931

Mr. Blaikie: Same objection.

A. No, I did not know that it was ever off the files until Mr. Edgar spoke of it to-day. I should more think that Mr. Bovee or Mr. Ritch had been up there and taken it —that is where we find everything that is missing, Mr. Bovee.

966 RD-Q. When you have referred to an agreement between the executors and Mrs. Fayerweather for the conveyance of the tomb, have you reference to an agreement in writing?

Mr. Blaikie: Same objection.

932

A. I have reference to the agreement signed by all three of the executors which is on record, and I think of the same date of her signing the agreement to release on the condition that those agreements on their part were fulfilled.

967 RD-Q. Then you did have reference to agreements in writing? A. I have seen it in print, I do not think I ever saw it in writing.

Mr. Bovee: Defendants now move to strike out all

of the testimony of the witness referring to any agreement between the executors and Mrs. Fayerweather in respect to the tomb as not the best evidence as being testimony in regard to the contents of a written instrument, that paper being the best evidence of any such agreement.

968 RD-Q. Were you present when any such agreement was ever executed by either the executors of Mr. Fayerweather or Mrs. Fayerweather?

933

Mr. Blaikie: Same objection.

A. I have been present when it has been offered in evidence in court, in the State court, and when it has been offered in this case as evidence from the Surrogate's record in which it appears.

Mr. Bovee: I repeat my question.

Mr. Blaikie: Same objection.

The Witness: What is the question?

(Question repeated by stenographer.)

The Witness: No, I was not present.

934

969 RD-Q. Did you see the tomb of Daniel B. Fayerweather when the construction of that tomb was begun? A. No, sir.

970 RD-Q. Did you see the tomb of Daniel B. Fayerweather before Mr. Fayerweather had been placed in that tomb? A. No, sir.

971 RD-Q. How long had he been in that tomb when you first saw it? A. I could not say that; it was some months and perhaps a year.

972 RD-Q. What is your best recollection?

Mr. Blaikie: The question is objected to as outside of the issues in this case.

A. Well, I should think it was hardly a year, but I could not remember the date.

973 RD-Q. A year after he had been placed in the tomb? A. Yes; it may have been more.

974 RD-Q. Is Mrs. Fayerweather interred in that tomb?

935

Mr. Blaikie: Same objection.

A. Yes, sir.

975 RD-Q. You were present at her interment, Mr. Reynolds?

Mr. Blaikie: Same objection.

A. Yes, sir,

976 RD-Q. When was that?

Mr. Blaikie: Same objection.

A. In July, 1892, I think.

977 RD-Q. Did you observe the tomb at that time?

936

Mr. Blaikie: Same objection.

A. Of course I was in it and assisted in the arrangements for placing her remains there; I was not inspecting it to see how it was constructed. I did notice that the water had come through, and I thought at the time that it was a condensation of the atmosphere on the windows which had dripped down; it had then passed one or more winters; and the mason work overhead I notice was covered with a white salt which I

then supposed came from the mortar constituting its roof; it was a mosaic. I never felt that the plans provided for any such thing as that, but I never could find the plans to find out whether they did or not; it was a perfectly absurd arrangement anyway; but the water had come down on the floor at the time we went there to bury Mrs. Fayerweather. I have been up there many times since and found that white seepage from the water washed away and dripped through and that it was followed by black mould, and the whole
937 bottom is filled with a slimy mould, black as the mould obtained in a swamp. I have cleaned it out many times myself and have had marble workers come in there and clean it out also. I noticed that at that time and had the people who removed it wash it and clean it thoroughly, and it lasted very well during that summer and until the following winter.

978 RD-Q. Do you consider that you have been answering my question, Mr. Reynolds? A. If it is read I will see whether I have got it covered or not.

RD-Q. 977 read by stenographer,

The Witness: Yes, that is the evidence of my observation.

938

Mr. Bovee: I move to strike out the entire answer as not responsive to the question. I did not ask you what you observed.

979 RD-Q. Have you ever done anything to repair the tomb of Mr. Fayerweather?

Mr. Blaikie: Same objection.

A. I have only so far as keeping it clean is concerned. I put an onyx flower stand inside of it. That is so affected by the slime that has trickled down upon it that

it could hardly be recognized as onyx. It cost several hundred dollars.

980 RD-Q. But you have never expended any money upon the repairs to the tomb of Daniel B. Fayerweather? A. Yes, I have in cleaning it out in that way.

981 RD-Q. How much have you spent, Mr. Reynolds? A. Well, it would not be possible to spend a very large sum in cleaning a leaky tomb.

982 RD-Q. Well, I did not suppose that it would. A. It is impossible to repair without rebuilding from
939 the foundation now.

983 RD-Q. I am not asking for your opinion, Mr. Reynolds. A. I should have spent money on it to a greater extent than I have if repairs would have answered the purpose, but it would be throwing money away.

984 RD-Q. Do you consider that an answer to a question which I have propounded, Mr. Reynolds? A. I think the ordinary man would understand what I meant by it if he heard it.

985 RD-Q. I now repeat my question and ask you to state how much money you have spent in repairs upon the tomb of Daniel B. Fayerweather? A. Well, I do not think it would exceed $100.

940

986 RD-Q. Either in your capacity as an individual or as an executor of the will of Mrs. Fayerweather, is that so? A. What has been spent by me has been spent as an individual.

987 RD-Q. As an individual? A. Yes, no charge for it to the estate.

988 RD-Q. Will you swear that you have ever spent as much as $100?

Mr. Blaikie: Same objection.

A. Well, I would not like to swear that I have spent more or less.

989 RD-Q. Will you swear that you have spent as much as $100? A. I think my last answer covers it as well as I could express it.

990 RD-Q. Is that the best answer that you can give? A. I think it is a satisfactory one.

991 RD-Q. It is not satisfactory to me and I am the person who is to be satisfied, Mr. Reynolds, if I can be. I have a right to ask these questions and I want
941 an answer. A. What is the question?

992 RD-Q. Will you swear that you have spent as much as $100? A. I would not like to swear that I have spent that or that I had not spent more than that.

993 RD-Q. Will you swear that you have spent as much as $50 in repairs upon the tomb of Daniel B. Fayerweather? A. I would be unwilling to swear to any figure or amount more closely than I have already stated.

994 RD-Q. Am I to understand from that statement that you are unwilling to swear that you have never spent as much as $50 upon the tomb of Daniel B. Fayerweather in repairs?

942

Mr. Blaikie: Same objection as last made.

A. I think you are not justified in expressing it in that way.

995 RD-Q. You may have whatever opinion you please, Mr. Reynolds, that does not answer my question. And I repeat my question.

Mr. Blaikie: Same objection.

A. I repeat the answer.

996 RD-Q. I now ask you to state the sum which you will swear that you have actually paid for repairs upon

the tomb of Daniel B. Fayerweather? A. It would be impossible for me to do so, while very willing to do so if I had the data to refer to.

997 RD-Q. The work which you have had done upon the tomb consisted in having the tomb cleaned out, as I understand you, was it not? A. Yes, sir; making the inside as respectable as possible.

998 RD-Q. When you filed this letter with the cemetery company on the 28th of May, 1898, did you consider that as executor of Mrs. Fayerweather you
943 had the right to control the access to that tomb and exercise dominion over that tomb?

Mr. Blaikie: Same objection.

At the request of the witness RD-Q. 998 repeated by stenographer.

A. I considered that I ought to have it, and that no one actually had it or could have it without special act of the Legislature conveying that authority upon them.

999 RD-Q. Have you, Mr. Reynolds, ever revoked that order which you filed with the cemetery company? A. No, sir.

944

1000 RD-Q. You have said that you called upon Mr. Thomas G. Ritch, one of the executors. Will you swear that Mr. Ritch ever refused to do whatever lay in his power to secure whatever repair was essentially necessary for the tomb of Mr. Fayerweather? A. When the subject of the tomb was up before Referee Dayton it was proposed that a committee for the repair of the tomb should be made, and I tried to become a member of that committee and Mr. Ritch would not consent to me. The only other act that he did in regard to it, I suppose he did it, was to procure

an order which was signed by Judge Pryor deeding it away to somebody else. I had a good deal of correspondence with Mr. Ritch on the subject, urging him to in some way consent that I should have to do with that repairing, and he would have nothing to do with me. He felt, I presume, that the courts had decided it and had put it in the hands of Mrs. Beardsley, and he ignored me entirely, and I presume felt rather happy in the position that he occupied; and the only thing left for me to do was to prevent his going on and
945 making repairs. He had a builder, I think Mr. Sinclair, I think his letter showed that, to go down there and make an estimate, that it would cost about $1,200 to go down there and put the tomb in repair; and I answered it; and my memory is that he made the estimate far below what it should be. I had no doubt that $1,200 would stop up the cracks in that tomb for a year or two, but it would only make it worse by filling the cracks where the water came through with something that would absorb water and next year freeze and throw the stones further apart; and I wrote Mr. Ritch that the construction should have been made so that the water would flow out instead of through the masonry; I know I made use of that expression, but I could
946 not get his ear or his heart to consent that I should have a word to say in regard to repairing the tomb which he had agreed to give to Mrs. Fayerweather, of whose estate I was executor.

1001 RD-Q Then we are to understand that because you could not be instrumental and a party to the repairing of the tomb you were determined to stop all proceedings, is that correct?

Mr. Blaikie: Same objection.

A. I was determined that it should not be repaired, so far as I was able to hinder it, by a lot of ghouls.

1002 RD-Q. Of which John B. Reynolds was not

one? A. Well, I should have liked to have been with them if they were going to take her remains or his remains away. They had stolen everything else but the tomb and they got the title away from her to that.

Mr. Bovee: I move to strike out the answer of the witness as scandalous and not responsive to the question.

947

The Witness: They got all but the contents of the tomb away from her.

1003 RD-Q. The judgment which you have referred to was the judgment made by Roger A. Pryor, a Justice of the Supreme Court, was it not? A. Yes, sir.

1004 RD-Q. Were you present in court when there was argument before Judge Pryor upon that judgment? A. I was.

1005 RD-Q. And also your counsel, Mr. Blaikie? A. Yes, sir.

1006 RD-Q. Mr. Blaikie was heard upon the settlement of that decree, was he not?

948

Mr. Blaikie: Objected to on the same grounds.

A. There never was a copy of that judgment served upon Mr. Blaikie or the executor until—never at all. There was one which did not have that provision in it served upon Mr. Blaikie, and after that provision was put in my recollection is that it was reprinted and sprung upon him in court, and he never knew that provision was in there until I called his attention to it, and I never saw it until after the whole argument had been made, and we were both surprised that that had been put in in that way.

1007 RD-Q. By whom were those copies of the judgment that were served upon Mr. Blaikie served?

Mr. Blaikie: Same objection.

A. I could not say.

1008 RD-Q. Is it not a fact that those papers were served upon Mr. Blaikie by the attorneys for the plaintiffs in that action of Amherst College against Ritch?

Mr. Blaikie: Same objection.

949

A. It is a fact that they were not; we never knew about that tomb being deeded to Mrs. Beardsley until after the argument before Judge Pryor.

1009 RD-Q. Is it not a fact that such judgment as was served upon Mr. Blaikie was received by him from the attorneys for the plaintiffs in this action?

Mr. Blaikie: Same objection and as incompetent. There is no evidence that he has knowledge on that subject.

A. I have no knowledge on that subject.

Mr. Bovee: I thought he might venture to say that it came from Putney & Bishop, as was the case——

950

Mr. Blaikie: I wish to strike out the remarks of the counsel as gratuitous and impertinent and irrelevant and nothing to do with the case, and a little heated also.

1010 RD-Q. Now I ask you again, Mr. Reynolds, if your attorney, Mr. Blaikie, was not heard in the oral argument upon the settlement of that decree before Judge Pryor? A. My recollection of it is that the whole thing was put through with a speed which

equalled the Empire State Express on the New York Central Railroad; we did not know what was done until after it was done any way.

1011 RD-Q. Don't you recall that after the decree was first noticed for settlement before Judge Pryor, upon the application of your attorney, Mr. Blaikie, there was an adjournment of eight days of that hearing?

Mr. Blaikie: Same objection, and as immaterial and outside the issues raised by the plea.

951

A. Your question refreshes my memory somewhat, and I have a faint recollection that there was a judgment prepared and served upon Mr. Blaikie. During that eight days this tomb question came up as a difficult one evidently for the colleges to handle, and they had to get rid of that tomb; it was on their hands and in some way they had to get rid of it; and they had it reprinted and came to Judge Pryor with a copy different from the one served on Mr. Blaikie, which I remember having seen and which as I say was rushed through with the speed of the Empire State Express, and we never knew anything about its having been conveyed to Mrs. Beardsley until after the show was over.

952

1012 RD-Q. Was any motion made by Mr. Blaikie or by you to have that decree so signed by Judge Pryor resettled in respect to those matters as to which you now say you had no knowledge?

Mr. Blaikie: Same objection.

A. I do not remember what was done, but I know we did everything that we could possibly think of to correct the wrong—I hardly call it an error.

1013 RD-Q. And the judgment of the Supreme Court

stood and stands so-day! A. It has up to date; I do not think it will when we get through the race.

1014 RD-Q. Mr. Reynolds, is it not a fact that Thomas G. Ritch stated to you that the repairing of the tomb of Mr. Fayerweather, as far as he was concerned, might be put in the hands of any reputable architect or tomb constructor in this city, of responsibility, with authority to put the same in good condition?

Mr. Blaikie: Same objection, outside the issue raised by the plea and incompetent and immaterial.

953

1015 RD-Q. Didn't Mr. Ritch so state to you?

Mr. Blaikie: Same objection.

A. I do not recall any such statement, Mr. Bovee.

1016 RD-Q. Mr. Ritch did decline, didn't he, to act in co-operation with you in having the tomb repaired?

Mr. Blaikie: Same objection.

A. Well, I do not know that I can say the words that were used.

1017 RD-Q. I am asking for facts simply, Mr. Reynolds, whether he did not decline to act with you. A. I think that was the result of the effort, that he wanted to have it done his way and by parties
954 that he selected.

1018 RD-Q. And was not that the cause of the hostile relations existing between you and him?

Mr. Blaikie: Same objection.

A. My memory is that I wrote him that I was willing to bury all feelings or want of confidence in him or the executors in order that that much-needed work might be done to the memory and to the protection of the tomb

of Mrs. Fayerweather. I think my letters to Mr. Ritch will show that.

1019 RD-Q. I did not ask you, Mr. Reynolds, what you did; I asked you what Mr. Ritch did. A. Yes, and that he declined to do anything where I had anything to say about it.

1020 RD-Q. And was not that by reason of the hostile relations existing between you and Thomas G. Ritch?

Mr. Blaikie: Same objection.

955

A. I do not know upon what other ground he could do so.

1021 RD-Q. Did you know of the firm of McKim, Meade & White, architects, going to Woodlawn Cemetery for the purpose of examining the tomb of Daniel B. Fayerweather?

Mr. Blaikie: Same objection.

A. I do not know that I could say that I knew of their going there; I think I have Mr. Ritch's letters that Mr. Sinclair went there, and possibly Mr. Ritch may have written me in regard to them, but even that——

956

1022 RD-Q. Did you object to Mr. Sinclair's doing any work upon the tomb? A. Wait until I get through. But even then with that class of work they would not be my selection.

1023 RD-Q. Did you object to Sinclair doing any work upon the tomb?

Mr. Blaikie: Same objection.

A. My letter will show what I objected to.

1024 RD-Q. Yes, but I want you to show. What is your recollection?

Mr. Blaikie: Same objection.

A. My recollection is that I filed that letter with the cemetery forbidding, so far as my authority would reach, anybody touching that without my approval; that I was willing to treat with anybody who would submit plans, who would do that work and do it well, but that the executors would not allow my interference, so called, when in reality if they had done their duty by Mrs. Fayerweather I would be the only one on the face of the earth who had any authority; the position was
957 one which was so supremely ridiculous that I could not consent to any one doing it without me.

1025 RD-Q. Do we understand then that your position was that unless you could be a party and exercise a supervision and control over such repairs as were made, you were determined that no repairs should be made whatever and the tomb of Daniel B. Fayerweather be allowed to get into the condition in which you have said it was at this time?

Mr. Blaikie: Same objection.

A. It got into the condition before this time, and I was endeavoring in every way I could to have it repaired, and I should have been willing to make
958 any concession, and never referred to any feeling towards Mr. Ritch in the whole of that construction, to have gone on with it just as pleasantly as I would with you, Mr. Bovee, if that end could be accomplished, looking only to the doing of the work thoroughly, and so far as any feeling was concerned moving it right out of the case. I felt myself competent to do that, and Mr. Ritch ought to have been as magnanimous to me.

1026 RD-Q. It was after you learned that Mr. Sinclair had been to the tomb to inspect it, and to make repairs that you filed this letter, was it?

Mr. Blaikie: Same objection.

A. It was after I had exhausted every means——

Mr. Bovee: No, no, now, Mr. Reynolds, I must insist upon you answering the question!

Mr. Blaikie: Answer it as you see fit, Mr. Reynolds.

Mr. Bovee: I do not think you should address a remark of that kind to the witness.

Mr. Blaikie: As long as you break out in instruction I will take my turn at it.

959

Mr. Bovee: I am seeking to get answers from the witness to close the examination.

The Witness: What is the question.

1027 RD-Q. The question is: "Did you file the letter after you had learned that Sinclair had been there to inspect the tomb with a view to making repairs?"

Mr. Blaikie: Same objection.

A. My recollection is that it was the last act of correspondence that I have had on the subject with any one.

1028 RD-Q. Now, I repeat my question, Mr. Reynolds. It is a plain question. A. That would
960 include Mr. Sinclair. All knowledge that I had of Mr. Sinclair's having been there and made estimates upon it was from a letter which I received from Thomas G. Ritch.

1029 RD-Q. Did you intend when you filed that letter to prevent Sinclair & Co. from doing any work upon that tomb?

Mr. Blaikie: Same objection.

A Sinclair and everybody else.

1030 RD-Q. And everybody else? A. Yes, sir; that did not submit first their plans to me and get my approval.

1031 RD-Q. Is that your attitude to-day, Mr. Reynolds?

Mr. Blaikie: Same objection.

A. Well, I will be willing to make any reasonable concession to have that work thoroughly done, but I should not wish to have it done by any one without my knowing what was to be done before the beginning of the work and seeing the plans, because I feel it my duty to Mrs. Fayerweather, as her executor, and I feel
961 it my duty to Mr. Fayerweather to carry out his plans in such a way that he, his wife and his wife's sister, now Mrs. Reynolds, should be buried exactly as he desired they should be, and as he planned for them. That matter was fully talked over with Mrs. Reynolds and Mrs. Fayerweather before our marriage, because I told Mrs. Reynolds in the case of my decease I wished her to have me buried beside my wife, my first wife, at Rutland, Vermont, where I have a very satisfactory burying ground myself——

1032 RD-Q. Oh, Mr. Reynolds, I beg of you—now I do not care anything about your burying ground and I have not asked you anything about it. A. Will you allow me to finish my answer?

962

1033 RD-Q. No, sir; I protest against it. A. You be careful you don't get in there before I do. I can't stand too much, Mr. Bovee.

1034 RD-Q. I assure the witness that his threats have no more influence upon me—— A. Well, your remarks don't irritate me; I regard them like a little monkey up in a tree, just about as much—you always make me think of a Jesse cat or a monkey

1035 RD-Q. Do you consider that responsive? A. I consider it very appropriate, Mr. Bovee, and I do not know as I shall ever have a better opportunity. I have

been insulted by you and by Mr. Ritch for about ten years now, and I think I can see pretty near the end of it. If I am defeated I am going to do it thinking I have done my duty thoroughly, and that you will know and Mr. Ritch will know and Bulkley will know and Vaughan will know and every lawyer in this case will know what manner of man I am, that I am willing and able to meet these fifty attorneys and defend myself at every spot and point and place; and if I have not gone through with the battles with sufficient energy and fear-
963 lessness I want to be shown the spots that are lacking and I will put a stone in there that you will remember. Sometimes it seems to me that nothing but bullets would do the business for you.

Mr. Bovee: We will now adjourn the further examination until Monday, at 2 P. M.

Mr. Blaikie: That is satisfactory.

Mr. Bovee: The time of the defendants has been extended by Judge Lacombe, Mr. Blaikie, in the order, which is made returnable to-morrow—that applies to all the defendants.

Mr. Blaikie: How long an extension?

Mr. Bovee: Only to the determination of the motion which is before the Court to-morrow.

964

Defendants offer in evidence the opinion of Judge Follett in the case of Amherst College against Ritch, reported in 91 Hun, page 509.

Mr. Blaikie: Objected to as not the best evidence, and incompetent and irrelevant.

Mr. Bovee: You do not make the objection that it is not the original opinion of the Court, I suppose, do you?

Mr. Blaikie: My objection is broad enough to include that.

Mr. Bovee: Well, do you mean to include that? I read from 91 Hun.

Mr. Blaikie: But you have not got it here.

Mr. Bovee: I read in evidence the opinion from 91 Hun.

Mr. Blaikie: Let the objection stand.

(See further offer, session of May 20, 1902).

The opinion is considered as Defendants' Exhibit No. 3, May 15, 1902, and reads as follows:

965

See Vol. IV, page 54. et seq

NEW YORK, May 19, 1902.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. BOVEE, Mr. BLAIKIE, and a representative of Messrs. ROOT, HOWARD, WINTHROP & STIMSON.

966

Mr. Blaikie: Mr. Bovee, if agreeable to you I will move to withdraw the answers to a few of the questions, RD-Q 1034 and RD-Q. 1035.

Mr. Bovee: On what page?

Mr. Blaikie: Pages 674 and 675. They were your questions, but I want the answers out.

Mr. Bovee: I certainly object to their going out. The record stands there.

Mr. Blaikie: I want to get them out if you agree; if not, very good.

Continuation of the REDIRECT EXAMINATION of JOHN B. REYNOLDS:

By Mr. Bovee:

1036 RD-Q. At page 647 you testified that the tomb was not completed when Mr. Fayerweather died. Do you know who did complete that tomb after his death? A. Not positively; I have an opinion.

1037 RD-Q. When you say not positively you mean that you have no information of your own knowl-
967 edge, is that correct? A. Yes, except as having knowledge that the payments were made by the executors from time to time.

1038 RD-Q. How long after Mr. Fayerweather's death was it before he was interred in the tomb? A. I do not know, except by having learned it through Mr. Knevals from the record.

1039 RD-Q. How much of the tomb had been built at the time of his death? A. I do not know.

1040 RD-Q. Do you know when the construction of the tomb began? A. I do not.

1041 RD-Q. Did Mr. Fayerweather ever tell you that that tomb was planned with the receptacles for himself, his wife and his wife's sister, now Mrs. Rey-
968 nolds? A. Mr. Fayerweather did not; Mrs. Fayerweather did.

Mr. Bovee: I move to strike out the statement tha Mrs. Fayerweather did, as not responsive to the question.

1042 RD-Q. At page 648 you said, "While Mr. Fayerweather's remains remained in the receiving vault they could have done so and fulfilled their part of that agreement." Is not that testimony given by you on page 648 also based upon information which you acquired from others and not actual knowledge of your own?

Mr. Blaikie: Objected to as incompetent, immaterial

and cross-examination of your own witness, and outside of the issues raised by the defendant executors and thereupon overruling the pleas and throwing the case open at large.

A. The information which I based that upon was from the statute relating to cemeteries, general, I think, throughout the State, but particularly called to my attention by the Woodlawn Cemetery, they furnishing me with a reference to the law, perhaps given by special charter to them, I do not know about that; at
969 any rate it was through that interview with Mr. Knevals, that I became familiar with that fact.

Mr. Bovee: I move to strike out the answer of the witness as not responsive to the question, and I repeat my question.

1042 RD-Q. repeated by stenographer.

Mr. Blaikie: Same objections.

The Witness: Well, I should add "in part" to make it short.

1043 RD-Q. What do you mean by "in part"? Is that your answer to my question or is it an addition? A. No, it is an answer to your question?

970

1044 RD-Q. Do you mean that it was in part based upon information which you acquired from others and not from your own knowledge.

Mr. Blaikie: Same objection.

A. Yes, sir.

1045 RD-Q. Have you not said that the cemetery lot in Woodlawn Cemetery was part of the residuary estate of Daniel B. Fayerweather?

Mr. Blaikie: Same objection.

A. That is as I understand it; yes, sir.

1046 RD-Q. And so claimed by the colleges named in the ninth clause of the will, the twenty-one colleges?

Mr. Blaikie: Same objection. It is twenty colleges.

1047 RD-Q. The twenty colleges.

Mr. Blaikie: Same objection.

A. I do not think I have said it was claimed by them, but by force of circumstances it was given to them, by neglect of the executors to fulfill what they had
971 agreed to do with Mrs. Fayerweather.

1048 RD-Q. As being included in part of the residuary estate of Daniel B. Fayerweather.

Mr. Blaikie: Same objection.

A. At the time of his death I regard that it was, inasmuch as a sheep pasture would have been a part of his residuary estate.

1049 RD-Q. You are familiar with the decision of Judge Truax in the case of Amherst *vs.* Ritch, are you not?

Mr. Blaikie: No objection.

972

A. Well, I think so, generally.

1050 RD-Q. Did not that decision hold that the twenty colleges named in the will held title to the entire residuary estate of Daniel B. Fayerweather?

Mr. Blaikie: Objected to as not the best evidence and incompetent.

A. I think that was the general effect of it.

1051 RD-Q. And did not that include the title to cemetery lot in Woodlawn Cemetery?

Mr. Blaikie: Same objection, incompetent and immaterial and outside the issues raised by the pleas.

A. So far as it was possible for the conveyance to be made by any judgment or by the executors, I should think it did.

1052 RD-Q. The judgment which you refer to on page 649 when you say, "When the judgment of the State Court was rendered, without saying anything to the parties representing the widow, they had incorporated into the judgment a provision that the tomb should be conveyed to Mrs. Beardsley;" the judgment which you refer to there was the judgment made by Justice
973 Roger A. Pryor, was it not? A. Yes, sir.

1053 RD-Q. At the time that that judgment was made, the judgment of Judge Truax which awarded the entire residuary estate to the twenty colleges named in the will had been affirmed in the Court of Appeals, had it not?

Mr. Blaikie: Objected to as not the best evidence, and incompetent and immaterial.

A. I so understand.

1054 RD-Q. Mr. Reynolds, who were the attorneys for the plaintiff in that action, as you recall it?

Mr. Blaikie: Same objection.

974

A. Of Amherst *vs.* Ritch?

1055 RD-Q. Yes? A. It would be very difficult for me to recall them all.
all.

1056 RD-Q. Oh, no; the attorneys for the plaintiff? A. Does that not mean the whole of the twenty colleges?

1057 RD-Q. No, sir; it means the attorneys for the plaintiff—Putney & Bishop, were they not? A. I think if you refer to the five colleges I can remember them.

Mr. Blaikie: They were the plaintiffs.

The Witness: They were Putney & Bishop, Martin W. Cooke, Elihu Root and Judge Russell, I think, his firm, I cannot remember the name of the firm—Russell & Holmes—that is all that I recollect.

1058 RD-Q. They were the attorneys for the plaintiffs? A. Yes.

1059 RD-Q. In that action, Mr. Reynolds, the plaintiffs had succeeded in their contention, had they not?

975

Mr. Blaikie: Same objection.

A. Well, I should think so up to that date.

1060 RD-Q. Now, Mr. Reynolds, the plaintiffs having succeeded in their contention in respect of the claims of the twenty colleges, don't you know as a matter of fact that whatever judgment was entered in that action, after the report of Mr. Dayton was made, was a judgment that was proposed and settled at the instance of the successful parties, to wit, the plaintiffs?

Mr. Blaikie: Same objection, and calling also for the opinion of the witness and not evidence.

A. What is the question?

976

1061 RD-Q. Now, Mr. Reynolds, the plaintiffs having succeeded in their contention in respect of the claims of the twenty colleges, don't you know as a matter of fact that whatever judgment was entered in that action, after the report of Mr. Dayton was made, was a judgment which was proposed and settled at the instance of the successful parties, to wit, the plaintiffs, by their attorneys?

Mr. Blaikie: Same objection, and not the best evidence and calling for the opinion of the witness.

A. So far as my knowledge goes, it included them with all of the other colleges interested with them which were in part represented by the offices of Arnoux, Ritch & Woodford and John E. Parsons.

Mr. Blaikie: He did not ask that.

The Witness: Well, I am trying to answer it correctly. What is the question again?

1061 RD-Q. repeated by stenographer.

977

Mr. Blaikie: Objected to on the grounds stated and no foundation laid for it.

The Witness: No; I do not know any such thing.

1062 RD-Q. Have you ever built a tomb in your life?

Mr. Blaikie: Objected to as immaterial and entirely outside the issues, and incompetent also.

A. With my own hands, no.

1063 RD-Q. Are you a stonecutter?

Mr. Blaikie: same objection.

978

A. I have been in the marble business as a stonecutter or finisher, building and furnishing materials for tombs and headstones and buildings. I think we furnished the tile for this building and many others in this town, and wainscoting. It has been my business for over fifteen years.

1064 RD-Q. Did you ever learn the trade of stone cutter?

Mr. Blaikie: Same objection.

A. I never served an apprenticeship.

1065 RD-Q. Did you ever hold a contract for the construction of a tomb or mauseleum?

Mr. Blaikie: Same objection.

A. Not as an individual. I used to have entire charge of the marble works which are now known as the Vermont Marble Company, or that part which is located at the Town of Proctor, and owned by Senator Proctor. I sold out to Senator Proctor.

979

1066 RD-Q. That was a marble quarry?

Mr. Blaikie: Same objection.

A. A marble quarry and mills and finishing shops. We employed several hundred men, if I remember right.

1067 RD-Q When did you have charge of that quarry?

Mr. Blaikie: Same objection.

A. I cannot remember the years, but I think in 1864 or 1865 or along there, and for about six or seven years afterwards. I have also been a director and manager of the Burlington Manufacturing Company of Bur-
980 lington, Vermont. My brother-in-law, who began his business with me in what is known now as the Town of Proctor, had entire charge of that business; and probably he and I, while we had a Board of Directors, did practically the whole business.

1068 RD-Q. What kind of business was that?

Mr. Blaikie: Same objection.

A. Well, we employed men there, I think about 250 men; we also employed a number of men in Chicago and Joliet States prisons, and, if my memory serves me right, at one time stone cutters in Sing Sing.

1069 RD-Q. You have not told me what business that was.

Mr. Blaikie: Same objection.

A. Everything in the line of stone work, whether it was monuments in the cemeteries or building material for the Government—we did a large amount of work for the Government.

1070 RD-Q. Did that company ever have a contract for the building of a tomb or mausoleum?

Mr. Blaikie: Same objection.

981

A. I think we furnished the material to one of our agents, I cannot now recall his name, but he afterwards had the business at Joliet and the Sing Sing matter, and he did that detail work.

1071 RD-Q. When did you last have anything to do with any stone quarry?

Mr. Blaikie: Same objection.

A. Well, I cannot say that I am divorced from the business entirely now, Mr. Bovee, I have a quarry which I own entirely myself.

1072 RD-Q. In Vermont? A. No, sir; in this State, close to the line of Vermont.

982

1073 RD-Q. Is it working?

Mr. Blaikie: Same objection.

A. Just at present it is not.

1074 RD-Q. How long is it since it has been working?

Mr. Blaikie: Same objection.

A. I should think two years and a half.

1075 RD-Q. When did you sell out your quarry in Vermont?

Mr. Blaikie: Same objection.

A. Well, I have got another one there that is not working; it never has been opened; I have not closed out my marble business entirely.

1076 RD-Q. Tell me of any tomb that you in your experience in the past have ever supervised the construction of.

Mr. Blaikie: Same objection.

983

A. Well, I cannot say that I ever have taken the contract and seen to its being carried out except as a general oversight in the materials; we always had a foreman who made estimates upon that class of work; but I was necessarily perfectly familiar with the principles involved in the making of a perfect headstone or a tomb; it is simple in one respect, but very few architects will make a tomb, which is to be exposed to the weather, as substantially as I could, Mr. Bovee, and my reason for saying that is that I have studied it probably more than any architect in going about the cemeteries, seeing the work of them, and discerning what were the defects and what caused the decay; and it is invariably the want of proper provision for
984 the water flowing from the joints; it is very simple and yet vital. A very large proportion of the tombs that are made by the architects in Woodlawn and Greenwood are a waste of money. You can ask any marble worker or tomb builder and they will tell you the same thing, that their plans are generally defective in not providing for the proper flowing away from their work of the moisture which falls upon it. The frost is sure to freeze any dampness which gets into a joint, and it will split a mountain in time, if it is not bigger than your finger.

1076 RD-Q repeated by stenographer.

JOHN B. REYNOLDS.

Mr. Bovee: I move to strike out the answer of the witness as not responsive, and I repeat my question.

Mr. Blaikie: Same objection.

The Witness: What is the question?

1076 RD-Q. repeated by stenographer.

The Witness: Now read my answer.

985

The answer was read by the stenographer as follows: "Well, I cannot say that I ever have taken the contract and seen to its being carried out, except as a general oversight in the materials. We always had a foreman who made estimates upon that class of work."

The Witness: I will repeat my answer down to that point.

1077 RD-Q. Is that the best answer you can make to the question? A. That is the correct answer. The best answer is the one I gave you.

1078 RD-Q. When you stated at page 650: "My experience has been for many years in that line of work," did you mean to convey the impression that

986 you had had experience in the practical construction and supervision of the construction of any tombs?

Mr. Blaikie: Same objection.

A. I meant to convey the impression that I was familiar with that kind of work from having had personal experience in business closely allied to it for many years.

1079 RD-Q. When was it that you had the fifteen years' experience that you refer to on page 661 in quarrying and manufacturing all kinds of marble for tombstones?

Mr. Blaikie: Same objection.

A. Well, I think it began from 1864 to 1867, and so far as it has been ended up to the present time—I do not consider that the end has yet come entirely; but that would involve a larger period of time.

1080 RD-Q. Do you mean by that that you have been quarrying and manufacturing marble for tombstones since 1864 or 1870?

Mr. Blaikie: Same objection.

987

A. That I have been interested in it, yes, sir, and until within a few years.

1081 RD-Q. Not other than as an investor?

Mr. Blaikie: Same objection.

A. As a director in a corporation where my brother-in-law and I have got the large part of the business to do.

1082 RD-Q. As a stockholder?

Mr. Blaikie: Same objection.

A. As a director.

1083 RD-Q. And as a stockholder?

988

Mr. Blaikie: Same objection.

A. Yes, sir.

1084 RD-Q. And as a practical manager.

Mr. Blaikie: Same objection.

A. I never received a salary from that company.

1085 RD-Q. Were you ever a practical manager of any company interested in the construction or the cutting of tombstones, Mr. Reynolds,

Mr. Blaikie: Same objection.

A. Yes, sir.

1086 RD-Q. When?

Mr. Blaikie: Same objection.

A. The dates are very difficult for me to fix. I can tell you in what concerns I have been interested in that capacity, Do you wish me to?

989

1087 RD-Q. Yes. A. I do not want it wiped out after I have gone through the list.

1088 RD-Q. As practical manager, my question was, Mr. Reynolds? A. Do you mean by that practical manager, practical manager or actual manager?

1089 RD-Q. Actual practical manager.

Mr. Blaikie: Same objection.

The Witness: Now what is the question?

Record read by stenographer.

A. I was the sole manager under the Board of Directors, all non-residents—no, excuse me, strike that out —of the Southerland Falls Marble Company,
990 which is now known as the Town of Proctor. After selling out my interest to Senator Proctor I carried on a business of my own in the Town of Rutland, and was the first man to introduce machinery for the finishing of stone for those purposes and building in the State of Vermont, while I was in business for myself. I have had to do with all of the present machinery, the making and inventing of the present machinery in use for the quarrying and finishing of stone—I will say most instead of all—in the State of Vermont. I personally built and cut, or cut and delivered the stone for the first building that ever I heard of being cut from Vermont marble.

Afterwards I had to do with the development of what is known now as the blue marbles of Vermont, perhaps the most popular marble quarried in the State today. I developed two of the first quarries and made them successful, one of them known as the Esperanza Marble Company, the other as the Monumental Marble Company; the latter I was president of and had the general management of for a number of years, I do not remember how long. Our quarries were at West Rutland,
and our mills at Fairhaven, Vermont, seventeen
991 miles away, where we had water-power to run them.

1090 RD-Q. Were you the practical manager of all of these concerns that you have now enumerated?

Mr. Blaikie: Same objection.

A. All employees were under my direction; I was practical in that way.

1091 RD-Q. Was there any other practical manager, other than yourself?

Mr. Blaikie: Same objection.

A. We always had foremen of the mills and foremen of the cutting shop or shops, foremen for the quarry and a force of office men in the office, all under
992 my direction.

1092 RD-Q. Where on page 663 you refer to an order signed by Judge Pryor deeding away the tomb to somebody else, who did you refer to in that expression "somebody else"?

Mr. Blaikie: Same objection.

A. Well, I had in my mind the executors of Mr. Fayerweather; I used the name of Mr. Ritch; I should have said, I suppose, "they did it," and included the executors where I have limited it to an individual.

Mr. Bovee: I move to strike out the answer of the witness as not responsive to the question.

1093 RD-Q. At page 663 you testified as follows: "The only other act that he did in regard to it, I suppose he did it, was to procure an order which was signed by Judge Pryor deeding it away to somebody else." Who did you mean by the somebody else?

993

Mr. Blaikie: Same objection.

A. I meant that they had conveyed it, or that the Judge had ordered it conveyed to a party other than the one which the executors had agreed to deed it to, Mrs. Fayerweather. The order of Judge Pryor calls for it to be deeded to Mrs. Lucy J. Beardsley, if I remember right.

1094 RD-Q. And was Mrs. Lucy J. Beardsley the somebody else that you referred to in that testimony?

Mr. Blaikie: Same objection.

994

A. Yes, sir; I think it might be so limited.

1095 RD-Q. That is all you meant, was it not; you meant Mrs. Lucy Beardsley?

Mr. Blaikie: Same objection.

A. Just as she was the party that I had in mind.

1096 RD-Q. She is the wife of Morris B. Beardsley of Bridgeport, Connecticut, is she not?

Mr. Blaikie: Same objection.

A. Yes, sir.

1097 RD-Q. She was a niece of Mr. Fayerweather's, was she not?

Mr. Blaikie: Same objection.

A. Yes, sir.

1098 RD-Q. Is she not the same lady to whom Mr. Fayerweather shortly before his death, gave a large sum of money?

995

Mr. Blaikie: Same objection, and no proof that he did give her any money.

Mr. Bovee: You forget your examination of Mr. Myrick in this case.

Mr. Blaikie: Yes, but I do not consider that proof.

A. I do not think he gave her any money just before his death.

1099 RD-Q. Did you not hear Mr. Myrick, in answer to questions propounded to him by your counsel Mr. Sherman, testify upon that subject?

Mr. Blaikie: Objected to on the same grounds and also because that does not prove it was the fact,
996 because Mr. Myrick said so; he might have been mistaken.

A. I heard Mr. Myrick's testimony.

1100 RD Q. Did you not hear him testify that Mr. Fayerweather directed a large sum of money to be paid to Mrs. Beardsley?

Mr. Blaikie: Same objection.

A. No, sir, he never testified any such thing.

1101 RD-Q. The relations between Mr. Fayerweather and this lady, Mrs. Beardsley, had always been of the most affectionate and cordial character, had they not?

Mr. Blaikie: Same objection.

A. I could not answer that question.

1102 RD-Q. Why can't you answer that question? A. Because I never heard either of them express themselves on the subject.

1103 RD-Q. Have you not heard others express themselves upon the subject?

Mr. Blaikie: Objected to as not evidence.

997

A. Yes, sir.

1104 RD-Q. And have you not heard others so express themselves?

Mr. Blaikie: Same objection. The former objection repeated.

A. I do not think, Mr. Bovee, you ought to call upon me to say what I have heard in that relation; it won't do you any good.

1105 RD-Q. I am very sure, Mr. Reynolds, that consideration for me or my clients would not prompt you to refrain from giving testimony? A. That is true, but Mr. Fayerweather's niece would, and I would rather be excused—and her husband, too.

998

Mr. Bovee: I think that is all.

Mr. Blaikie: I called upon you to produce, Mr. Bovee, a letter of Reynolds to your former partner, Mr. Wallace; have you brought it here?

Mr. Bovee: I have.

Mr. Blaikie: Will you let me see it?

Mr. Bovee: Yes.

Mr. Blaikie: I offer it in evidence and ask to have it marked as Complainants' Exhibit.

Mr. Bovee: Objected to as irrelevant and immaterial.

The paper was marked Complainants' Exhibit No. 1, May 19th, 1902, C. B.

The exhibit is as follows:

999

" J. B. REYNOLDS,
11 East 57th Street.
NEW YORK, June 16th, 1897.

W. C. WALLACE, Esq.,
Representing Thomas Ritch,
Executor, Trustee, etc.,
18 Wall Street, New York.

DEAR SIR:

Answering yours of yesterday enclosing report of Mr. Ritch's expert (Mr. David Crear), and requesting my suggestions, I have to say, the whole proceedings on this matter, so far as I know them, appear supremely ridiculous, such calking works well on a leaky
1000 scow, rendering it safe for shallow waters, for a season or two, but all joints in monumental structure should be overlapped, with washes, to make the natural flow of water, out of, instead of into, the masonry. This principle was disregarded or sacrificed to secure (perhaps) a pleasing effect in design. Any effort to repair by patching, as proposed by Mr. Crear will only do, what we see constantly going on, in the repair of our sidewalks and skylights. If the rooms below are occupied the first leak is discovered, and the repair quickly made. In cemetery work these conditions of protection are wanting and the probabilities of neglect, or oversight, are greater, with a re-

sult, that *in a year, some of the same imperfections now* seen, will show, another year of freezing, will develop more, and so on, until matters are even worse than now.

This tomb, it is claimed, is the property of the twenty colleges, and they claim, that they have the right to make such repairs as they see fit. Mr. Ritch has been informally delegated to act for them. My interest in wanting this work well, and quickly done, led me to press myself upon the committee, or as a delegate, to act

1001 with Mr. Ritch. He has declined any personal interview, or counsel upon the subject, refusing to visit the tomb with me, as I requested, because of personal feeling, the existence of which is quite natural on his part, yet, perhaps, it might as naturally be looked for, in me, towards him ; but where duty calls me to act in behalf of Mr. Fayerweather, or his family, I could not respect myself if I let such feeling prevent the most wise discharge of that duty ; and when that duty is to protect his and his wife's remains, all thought of personal injustice, or accusation, should be put aside as Mr. Ritch and I would do, if at sea, and our craft took fire, we would both use our best effort and judgment to put out the fire.

With no better results I asked Mr. Wm. B. Putney

1002 to go with me to see the condition of this tomb, making the appointment for Sunday, so that it might, perhaps, be more convenient for him, and because it is my favorite day for visiting there.

I am now contemplating the submission of all that has been said and written on this subject to the presidents of the twenty colleges asking them to meet me at the tomb on a specified day—personally, or by a delegate from their Board, to take definite action. I feel they should have this opportunity before the needful steps are taken for the removal of Mr. and Mrs. Fayerweather's remains. Nothing has taken place in the sad history of the acts relating to the will and widow of Mr.

Fayerweather that has been so hard for Mrs. Reynolds to endure as the seeming indifference shown to his and her last resting place. To show any hesitancy in making suitable and substantial provision is a condition of which those he has so generously benefited should be ashamed. The chief point with Mr. Ritch appears to be how cheap, and not how well, it can be done, *how much can be saved to divide among those twenty colleges and their attorneys.* Economy is usually commendable, but where such lavish generosity, as
1003 was shown by Mr. Fayerweather and by his executors in the payment of such sums to attorneys, is it becoming to begin at this late day to practice it in making proper provision for his sacred remains.

Respectfully yours.

J. B. REYNOLDS."

RECROSS EXAMINATION by Mr. Blaikie:

1106 Re-x-Q. In response to 1033, 1034 and 1035 questions by Mr. Bovee, you made some remarks which I will ask you to explain more fully, and the reason why you made them?

Mr. Bovee: I object to the question as incompetent, as not proper in correction of the witness' testi-
1004 mony, or a competent or proper way of purging the witness of the gross contempt of court which he has been guilty of.

Mr. Blaikie: Complainants' counsel states that he is not administering any purgative, nor does he feel bound by the ruling of defendants' counsel in his characterization of the conduct of the witness, and requests the witness to proceed with his answer.

At the request of the witness 1106 Re-x-Q. repeated by stenographer.

A. Mr. Bovee had attempted by inference to throw upon me the theft or removal of a letter by Mr. Blaikie to the Woodlawn Cemetery; he had attempted to throw upon me the ignominy of the neglect and disgrace of having Mr. Fayerweather's remains and Mrs. Fayerweather's remains so exposed for this long period of time when he knew that Thomas G. Ritch was solely responsible for it; and he designed the record to show, by bringing in only a part of the truth, that I was the responsible party for this neglect. He had previously by inference implied that I might have stolen
1005 from the Surrogates' office the will of Mr. Fayerweather, which I believe, and I have heard others express the same belief, that he knew who took that will from the Surrogates' office and how it came back, and that it was all the time in the office of Arnoux, Ritch & Woodford while it was missing from the Surrogates' office; he had tried to throw this stain upon me, and it was a straw which was one straw too much for me to bear, and I used the language which perhaps I should not have used but for which I had great occasion.

1107 Re-x-Q. Have you anything else to say?

Mr. Bovee: One minute. I move to strike out the answer of the witness as incompetent. It is not in any sense an explanation or a correction of his testi-
1006 mony, or a fit apology to the Court; and I ask the Exam ner to certify my motion to the Court.

The Witness: I am perfectly willing to go there before the Court, or before any Court on earth or in heaven, Mr. Bovee, in regard to my record in this case in word, thought or deed, at any moment.

Mr. Bovee: I object to any statements pending Mr. Shields being called into the room. I have asked no question and there is no statement called for, and I do not care to discuss matters outside of the record with this witness.

At this point the Examiner was called in and the record read to him.

Mr. Bovee: Mr. Examiner, I ask you to certify the question and answer and my motion to strike out, to the Court.

The Examiner so certifies.

JOHN A. SHIELDS,
Examiner.

1007

Adjourned to May 21, 1902, at 2 P. M.

NEW YORK, May 21, 1902.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. BLAIKIE, Mr. PARSONS, Mr. BOVEE, Mr. CARNOCHAN and Mr. GOODALE.

Continuation of the RECROSS-EXAMINATION of John B. Reynolds:

1008

By Mr. Blaikie:

1108 Re-x-Q. Mr. Reynolds, the agreement between Mr. Ritch, Mr. Bulkley and Mr. Vaughan in regard to, among other things, the tomb of Mr. Fayerweather at Woodlawn, has been referred to; have you that agreement here?

A. I have.

1109 Re-x-Q. Will you let me see it?

Witness hands same to counsel.

1110 Re-x-Q. Please look at the signatures to that agreement; what is the first signature you find on it? A. Justus L. Bulkley.

1111 Re-x-Q. In whose handwriting? A. In the handwriting of Mr. Bulkley.

1112 Re-x-Q. And the next signature is whose? A. Thomas G. Ritch's.

1113 Re-x-Q. In whose handwriting? A. Thomas G. Ritch's handwriting.

1009

1114 Re-x-Q. And the next signature is whose? A. Henry B. Vaughan's.

1115 Re-x-Q. And in whose handwriting? A. The handwriting of Henry B. Vaughan.

1116 Re-x-Q. Are there any other signatures, if so, what are they? A. The signature of Henry Stoddard.

1117 Re-x-Q. Do you know that signature? A. I do not.

1118 Re-x-Q. Any other signature? A. S. P. Nash.

1119 Re-x-Q. Do you know that signature? A. I do not.

1010

Mr. Blaikie: I offer in evidence this paper.

Mr. Bovee: Defendants object to the paper as irrelevant and immaterial to the issues raised by the special pleas, and as incompetent.

The paper was admitted in evidence and marked Complainants' Exhibit No. 1, May 21, 1902, C. B.

Exhibit No. 1 is as follows:

"WHEREAS, We the undersigned JUSTUS L. BULKLEY, THOMAS G. RITCH and HENRY B. VAUGHAN,

residuary devisees and legatees under the Will, meaning thereby the original Will and subsequent codicils of Daniel B. Fayerweather, late of the City of New York, deceased, did under our hands and seals on the twenty-fourth day of February, 1891, execute a deed of gift disposing of the residuary estate left to us by the said Will, and in and by said deed reserved the power to make and retained the right to assent to any enlargement of the Fifteen thousand dollars given by the Will to Mrs. Fayerweather which she might desire,
1011 and also reserved the power to make, and retained the right to assent to any enlargement of the provision made by the Will for Mrs. Mary W. Achter and Mrs. Emma S. Drury, in case we should be satisfied that such enlargement would not be against he wishes of Mr. Fayerweather; and

WHEREAS a desire has been expressed to us by Mrs. Fayerweather for the enlargement hereinafter made of the amount left to her by the Will as aforesaid; and

WHEREAS we have become satisfied that it would be the wish of Mr. Fayerweather to make the enlargement hereinafter provided of the provision by the said will for Mrs. Achter and Mrs. Drury
1012 aforesaid;

NOW, KNOW ALL MEN BY THESE PRESENTS: That under the power, authority and rights reserved and retained by the deed of gift aforesaid,

FIRST: We hereby give

1. To the wife of the said Daniel B. Fayerweather, deceased, the capital sum of Two hundred and twenty-five thousand dollars, bearing interest from April 4, 1891, upon any part thereof then unpaid to be at her absolute disposal, and also to increase her annuity of Fifteen thousand dollars a year so long as she shall live,

to the sum of twenty-five thousand dollars for the period of her life; and we also agree to execute to her a deed of the lot in Woodlawn Cemetery, intended for the interment of the remains of Mr. Fayerweather.

2. To Mrs. Mary W. Achter, the sum of Forty-two thousand five hundred dollars, and to Mrs. Emma S. Drury the sum of Forty-two thousand five hundred dollars, bearing interest from April 4, 1891, upon any part thereof then unpaid.

1013

SECOND: And inasmuch as the reservation and retaining of the powers and rights to make the foregoing gifts were, in the said deed of gift executed on the twenty-fourth day of February, 1891, hereinbefore mentioned, made the first and second paragraphs thereof. We hereby declare that the payments hereinbefore provided for shall have precedence over the gifts mentioned in the Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth paragraphs of said deed of gift.

THIRD: The foregoing gifts are made subject to the provisions of the Tenth paragraph of the deed of gift executed on the twenty-fourth day of February, 1891, hereinbefore mentioned.

1014

IN WITNESS WHEREOF, we have hereunto set our hands and seals and delivered this instrument to Henry Stoddard and Stephen P. Nash, mentioned in the deed of gift aforesaid, this fifth day of March, 1891.

(Executed in triplicate.)

JUSTUS L. BULKLEY. [SEAL.]
THOMAS G. RITCH. [SEAL.]
H. B. VAUGHAN. [SEAL.]

We accept the foregoing instrument under the provisions of the first and second paragraphs of the deed of gift therein mentioned, heretofore accepted by us.

Dated New York, March 5, 1891.

HENRY STODDARD.
S. P. NASH."

Mr. Blaikie: That is all, Mr. Reynolds.

RE-DIRECT-EXAMINATION by Mr. Bovee:

1015

1120 RD-Q. Where did you get this paper? A. I found it among the papers of Mrs. Lucy Fayerweather.

1121 RD-Q. The deed of gift which is referred to in this paper was afterwards set aside by the judgment of the Supreme Court, was it not?

Mr. Blaikie: Objected to as not the best evidence, and incompetent and immaterial.

A. I so understand.

1122 RD-Q. And by that judgment it was held the title of the entire residuary estate, which included the property in the tomb, was held by Bulkley, Ritch and Vaughan, as trustees for the twenty colleges, was

1016 it not?

Mr. Blaikie: Same objection and not the best evidence.

A. I do not think I am competent to answer that question as to what that judgment covered.

1123 RD-Q. Do you mean by that that you have not read that judgment? A. No, sir.

1124 RD-Q You are thoroughly familiar with all its provisions, are you not? A. I have read it, but not for a considerable length of time.

1125 RD-Q. You have read it a good many times, have you not?

Mr. Blaikie: Objected to on the same grounds.

A. Yes, some parts of it, I haven't read it all many times.

1126 RD-Q, Well, you know, Mr. Reynolds, do you not, that that judgment held that Bulkley, Ritch & Vaughan had no right to hold the residuary estate of Mr. Fayerweather as individuals, as residuary
1017 legatees?

Mr. Blaikie: Same objection.

A. I came to that conclusion and the conclusion that the Court undertook to do something that they hadn't the power to do, by ordering it to be conveyed contrary to the statute of the State of New York.

Mr. Bovee: I move to strike out the answer of the witness as to what the Court undertook to do or did do as not responsive to the question.

By Mr. Parsons:

1127 RD-Q. Reference has been made to something that was said or arranged about the tomb at a
1018 meeting at the office of Mr. Referee Dayton; were you present?

Mr. Blaikie: Objected to as incompetent, immaterial and outside of the issues raised by the special plea.

Mr. Parsons: The counsel for the executors say that they recognize that that is outside of the issues raised by the special plea, as is that of all the testimony about the tomb, and that they are willing to have all such testimony omitted from the record, but in the absence of that being done they propose to cross-examine the witness.

Mr. Blaikie: Complainant's counsel has nothing to add.

A. I think I was present at all those hearings.

1128 RD-Q. Do you not remember that Mr. Parsons was present, and the three executors in person were present, and that the various institutions were represented by counsel who were present?

Mr. Blaikie: Same objection.

A. I do not think all the parties that you name were there at all the times that I was there.

1019

1129 RD-Q. I speak about this particular occasion when something occurred about caring for the tomb; weren't they all present at that time?

Mr. Blaikie: Same objection.

A. My recollection is not sufficiently distinct to say that they were.

1130 RD-Q. As to which one of the parties mentioned is there a doubt in your mind as to whether he was personally present?

Mr. Blaikie: Same objection.

1020

A. I think Mr. Ritch and Mr. Vaughan and Mr. Bulkley were there less frequently than the other parties mentioned.

1131 RD-Q. I am asking about that particular occasion; have you any doubt that each one of them was present at that particular occasion?

Mr. Blaikie: Same objection.

A. I should not like to say they were or were not; they would be better witnesses on that; their memory would be better than mine.

1132 RD-Q. Have you any recollection of what occurred in reference to the tomb at that time?

Mr. Blaikie: Same objection.

A. In general, yes, sir.

1133 RD-Q. Who was it, according to your recollection, who called attention first to the necessity of repairs to the tomb?

Mr. Blaikie: Same objection.

1021

A. On that occasion?

1134 RD-Q. On that occasion?

Mr. Blaikie: Same objection.

A. I do not remember.

1135 RD-Q. Do you remember what was said by Mr. Parsons on that occasion?

Mr. Blaikie: Same objection.

A. I do not on that occasion, but I have a letter from Mr. Parsons that I remember very distinctly, on the subject.

1022

1136 RD-Q. Did not Mr. Parsons on that occasion say that waiving or passing any question of whose interest it concerned, or in other words, whom it should be ultimately determined owned the residuary estate, the tomb should be repaired, and proposed that it should be done at the expense of the fund, and that it should be done by and according to the judgment of Mr. Ritch. And do you not remember that you personally upon that suggested that if you assented to such an arrangement you desired the opportunity of

making suggestions; and it was then said that suggestions might be made, through Mr. Wallace, by you to Mr. Ritch?

Mr. Blaikie: Same objection.

A. I do not remember such an occurrence as that; I do remember your making the remark that the tomb should be repaired, and that it should be done with liberality, or something of that kind.

1023

1137 RD-Q. But under whose direction?

Mr. Blaikie: Same objection.

A. I think there was something said about a committee being formed for that purpose, and I made a request to be put upon that committee.

1138 RD-Q. About that you have testified. What I wish to know is whether you do not remember that the proposal was that the work should be done under the direction of Mr. Ritch?

Mr. Blaikie: Same objection.

A. I have some such recollection as that.

1024

1139 RD-Q. And was not the outcome that everybody acquiesced with the suggestion from you that you desired to make some proposal, and then the statement that that might be, made to Mr. Ritch by you, through Mr. Wallace?

Mr. Blaikie: Same objection.

A. I never consented that Mr. Ritch, who had robbed Mr. Fayerweather and Mrs. Fayerweather of this tomb, should have the privilege of going on making repairs,

rebuilding, as I thought was necessary, without consulting me and without my authority in it and my approval of everything that was done.

1140 RD-Q. Did this same objection on your part to have any repairs to the tomb made by or under the direction of Mr. Ritch, apply to Mr. Bulkley and Mr. Vaughan?

Mr. Blaikie: Same objection.

1025

A. It would have if they had been put on that committee; yes, sir.

1141 RD-Q. In other words, you refused to consent that any work by way of repairs should be done by Mr. Ritch, by Mr. Bulkley or by Mr. Vaughan?

Mr. Blaikie: Same objection.

A. I regarded the matter as a usurpation of power which they had agreed to confer upon Mrs. Fayerweather, to have the full, absolute control of Mr. Fayerweather's last resting place, and that their neglect should not be used to shut out the only representative they had on earth that was trying to
1026 do what was right by them to carry out both their wills.

1142 RD Q. Are you aware that you stand upon this record both as complaining that Messrs. Ritch, Bulkley and Vaughan did not make the repairs to the tomb, and as also taking the position reiterated to-day that you would not consent that they should make such repairs?

Mr. Blaikie: Same objection, and no foundation laid for it.

A. I am not aware of any such fact on the record. I have always been ready to consult with the most wicked

one of the three of them, or all of them together, that Mr. Fayerweather's tomb might be repaired; I was willing to put money and time into it, and if it was the only way it could be done, to do it with my own hands—to work harmoniously with all three of them. That subject is too dear to me, and too dear to Mrs. Reynolds to have any personal feeling, to prevent the right being done, so far as can be with that unfortunate piece of property

1027

1143 RD-Q. You or your counsel have put in evidence an agreement of March 5, 1891, containing the provision that, subject to certain provisions of the so-called deed of gift, the executors would execute to Mrs. Fayerweather a deed of the Woodlawn Cemetery lot. What was the date of Mrs. Fayerweather's death?

Mr. Blaikie: Same objection.

A. I think it was July 16, 1892.

1144 RD-Q. In other words, about a year, or a little more than a year after the date of the agreement? A. Yes, sir.

1028

1145 RD-Q. During the interval was the estate in litigation?

Mr. Blaikie: Same objection.

A. Only for a very short period prior to her death. I should say a few months.

1146 RD-Q. Was the litigation to which you refer commenced by you?

Mr. Blaikie: Same objection.

A. No, sir; it was commenced by Mrs. Fayerweather.

1147 RD-Q. Was the object of it to take away the estate from the executors?

Mr. Blaikie: Same objection; not the best evidence; the pleadings will show.

A. The purpose of it was to right the wrong that had been done to Mrs. Fayerweather, so far as related to her; I think no one else was interested in the case at
1029 that time but her.

1148 RD-Q. Was the object of it to take the estate away from the executors?

Mr. Blaikie: Same objection.

A. So much of it as belonged to Mrs. Fayerweather, yes.

1149 RD-Q. And it claimed that it all belonged to Mrs. Fayerweather and the nieces?

Mr. Blaikie: Same objection.

A. I cannot remember whether it was for more than the first half or the second half of the estate, or
1030 whether they claimed the excess of what was given away specifically.

1150 RD-Q. At all events, the claim was as large as could be made?

Mr. Blaikie: Same objection.

A. No; I think it could have been made very justly for the whole estate; Mr. Parsons said so at one time in court.

Mr. Parsons: I object to the volunteered and mistaken statement about what was said by Mr. Parsons in court; he never said anything of the kind.

1151 RD-Q. So that you stand upon this record as complaining of the executors that they did not carry out an agreement in respect of the estate, and also as having continued a suit commenced by Mrs. Fayerweather, the purpose of which was to prevent their having any part of the estate; is that so?

Mr. Blaikie: Same objection.

A. That question is so mixed I shall have to ask to have it read again.

1031

1151 RD-Q. read by the stenographer.

Mr. Blaikie: Same objection.

A. I think I would rather leave the record to show what my standing is than undertake to define it myself.

1152 RD-Q. Does that answer mean that you are incompetent or that you are unwilling to admit the inconsistency of your position?

Mr. Blaikie: Same objection.

A. It means that the question is so involved that I think it would require some reflection and study,
1032 perhaps, to know what the questioner designed to draw out, and what would be a truthful answer.

1153 RD-Q. At all events, you do not want to answer that question now?

Mr. Blaikie: Same objection; there is no evidence that he does not.

A. I do not want to complicate myself by an answer when I do not fully understand the question.

1154 RD-Q. Have you intended by your previous testimony to charge the executors with any responsibility for the provision in the judgment in the five colleges

suit, to the effect that the executors should release the cemetery lot to Mrs. Beardsley?

Mr. Blaikie: Same objection.

A. Will you read the question?

I154 RD-Q. read by the stenographer.

Mr. Blaikie: Same objection.

A. Yes, sir.

1033

1155 RD-Q. Are you not aware that the form of judgment was proposed, not by the executors, but by the plaintiffs' attorneys in the five colleges suit; that this proposed form of judgment containing the provision with regard to the cemetery lot was served upon your attorney; that at an adjourned day the proposed form of judgment, which was in print, was submitted to Judge Pryor, and that it was under those circumstances that that provision became inserted in the judgment:

Mr. Blaikie: No objection.

A. I am aware of the custom of the successful parties, or complainants if they are successful, to draw
1034 an order or judgment, and am also aware that in this particular case that the attorneys for the executors were also attor neys for the colleges who were interested who were the successful parties in the issue, and from what knowledge has come to me, that they all had a hand in trying to get rid of that tomb off their hands, and that that scheme was got up in my belief, and the best knowledge I had of it, after consulting with the whole of them or all of them that had taken any prominent position in it. As to the point of having this judgment served upon my attorneys, there were two printings of it, as I re-

member. I know that Mr. Blaikie or I never saw a judgment or order that was offered to Judge Pryor and was acted upon, and did not know that that provision was in it; Mr. Blaikie never knew until I called his attention to that point after the argument before Judge Pryor.

1156 RD-Q. How do you know that there were two different printed forms? A. That is my recollection of it. The first one was served, the next one
1035 with that provision in it was not served; that is my recollection of it.

1157 RD-Q. Do you know this from the fact that you saw both? A. No; I never saw the one that Judge Pryor adopted.

1158 RD-Q. You saw the earlier one? A. I have a recollection of seeing the early one, but I may be wrong about that.

1159 RD-Q. (Handing paper) Look at that and say whether that is not the earlier one? A. Well, if it was the early one then it is probable that there was not but one, but I do not think I ever saw that, and I know that Mr. Blaikie never saw it, because there is that particular clause in it, until after the pleadings before Judge Pryor.

1036

1160 RD-Q. Don't you see, Mr. Reynolds, by inspection of the very paper itself, that your memory is at fault, and that in the first of those two papers there was this very provision about the cemetery lot?

Mr. Blaikie: Objected to. There is no evidence this is the original paper; it is incompetent, no foundation laid, and outside the issues raised by the pleas. Also that it is not an official paper; there is no evidence that it is of any weight; it is written on with pencil markings, and there is no evidence that they were on the original or anything equivalent to them.

Mr. Parsons: The question applies to the paper as in print, and not to the pencil markings.

Mr. Blaikie: The paper handed the witness had pencil markings.

A. Is there another one that he did act upon; is this the first one and was there a second one?

1161 RD-Q. Yes. The second one is the one that was incorporated in the judgment. Do you wish to see a copy of the clause about the tomb? A. I know
1037 what that was, but isn't that a copy of this; in what respect do they differ?

1162 RD-Q. You can make a comparison; you have now the original or proposed form containing this provision, and you have the second form. You say there were two; which constitutes the judgment? A. I could not identify them without reading them.

Mr. Blakie: There is no proof that that is an original. Here is a paper produced; there is no file mark on it and there is no evidence from anybody's mouth that it is an original; there is a lot of memoranda written over it and a certain clause stricken out.

The Witness: I do not know where they differ, but I think I can satisfy my own mind that this was
1038 the second or else it was the first.

1163 RD-Q. Mr. Reynolds, the point is here: There was served by the attorneys for the five colleges a printed proposed form of judgment; that is the first form, you say there were two; there was then eventually printed the second form which was signed by Judge Pryor. Now you stand upon this record as stating that in the first form there was no provision in respect of the cemetery lot; our position is that the paper itself shows that you are mistaken. Now we wish to know whether, after your attention is called to the very paper itself, that is the copy that was served on Parsons, Shepard & Ogden by the attorneys for the five colleges, you wish to

adhere to the testimony which you have given, that there was in the first form no provision, or whether you wish to admit you have made a mistake?

Mr. Blaikie: Were these various lead pencil memoranda and marks on it when it was served upon you gentlemen?

Mr. Parsons: I presume not.

1039

A. My choice is to be absolutely correct, Mr. Parsons, and I am willing and want to correct anything that I have made an error in.

1164 RD-Q. Do you not see for yourself that in that matter you have made an error?

Mr. Blaikie: Same objection.

A. I am confident that I never saw that provision in the proposed settlement, and Mr. Blaikie did not, because he did not know it until after I had called his attention to it after the argument or presentation of the order to Judge Pryor.

1165 RD-Q. Which do you mean to state, that you did not notice it or that it was not there?

1040

Mr. Blaikie: Same objection.

A. Well, I am willing to leave that matter on the point that I may not have noticed it; if this is the original paper that was served upon Mr. Blaikie I must have been unaware of it, or he, perhaps, did not show it to me. I know I did not know it until I heard it before Judge Pryor, and I called his attention to it immediately; I tried to have it corrected. I talked with Mr. Putney about it, of the wrong that it was doing to

Mr. Fayerweather; he never designed that Mrs. Beardsley and his two nieces, who were all three non-residents, should have the care of his tomb. Nothing could be more positive in determining what Mr. Fayerweather's will was in regard to his property, that he didn't know what he was doing, than the fact that he had put his tomb in the hands of his executors so that his wife should not have control over it.

1166 RD-Q. When did you have these conversations with Mr. Putney?

1041

Mr. Blaikie: Same objection.

A. Well, I wouldn't want to say that I did at any particular time: I know I had a great many conversations with him on the subject.

1167 RD-Q. I mean these particular conversations in which you told Mr. Putney that you objected to this proposed provision about the tomb; when did you have those conversations?

Mr. Blaikie: Same objection.

A. Well, it followed the judgment, when I was trying to get some immediate action on the repairing
1042 of the tomb. I saw him at once, and told him so and everybody else that I had any conversation with on the subject, notwithstanding Judge Pryor's judgment, the very hour that Mr. Fayerweather's remains were put into that tomb, that lot and the tomb by law became the property of Mrs. Beardsley and the other two nieces; it required no judgment of Judge Pryor to put it there; he couldn't take it out or put it in, or anybody else.

1168 RD-Q. Mr. Reynolds, won't you be kind enough to try once, if only once, to answer as succinctly as possible the question that is put to you—the question simply

asks when did you have with Mr. Putney the conversations about which you have testified, the outcome of which was that Mr. Putney was not willing or did not consent to change that proposed provision. When did you have that conversation or those conversations?

Mr. Blaikie: Same objection.

A. I did not say any such thing, Mr. Parsons; your first question did not imply what your second one does.

I said I had a talk in general with Mr. Putney,
1043 and told him of the dissatisfaction in regard to it; that it was a part of the consideration if the releases were valid; that he might just as well have left out the $200,000 that was given to her, or refused to give her the annuity that was provided for her.

1169 RD-Q. And Mr. Putney did not acquiesce in the change; is that the idea? Mr. Putney would not acquiesce in this change that you desired?

Mr. Blaikie: Same objection.

A. I cannot say that I cared a straw about the judgment of Judge Pryor; I said it was of no consequence. I wanted to get that tomb repaired; that was what I was working at.

1044

1170 RD-Q. All right; if you did not care anything about the judgment of Judge Pryor, we will let the matter rest there? A. The title was diverted from Mrs. Fayerweather and she did not get what they agreed to give her; if the releases were at all sustained she should have had the full consideration of them.

1171 RD-Q. Are you aware that upon this record you stand in the position both of maintaining that the so-called releases were void, and also of complaining that the executors ought to have carried out the provisions,

and also of having maintained a litigation the object of which was to deprive the executors of all the estate, and so to make it impossible for them to carry out those provisions.

Mr. Blaikie: Same objection.

A. I understand that my position in the record is that the consideration for the releases which Judge Pryor's judgment held to be valid, was not given to Mrs. Fayer-
weather; that I have always contended that they
1045 were wrongfully obtained from her as a whole,
and also that the executors, as a whole, were not the executors of Mr. Fayerweather; that Mr. Fayerweather on the 11th of November, 1890, four days before he died, made a codicil removing Mr. Ritch as an executor of that will; that he made a codicil through Mr. Ritch's instigation, drafting it in his office, reinstating himself, on the Saturday following, four days after that date, and procured Mr. Fayerweather's signature to it when he was dying; and Mr. Ritch is not Mr. Fayerweather's executor in truth to-day, except by usurpation.

1172 RD-Q. This adds a fourth position inconsistent with each of the others, as is each of the others inconsistent with the others, does it not?

1046

Mr. Blaikie: Same objection.

A. I do not see any inconsistency in any of them; there is a multitude more of them, I have no doubt of.

1173 RD-Q. In other words, there is no inconsistency in your claim that he is not an executor and has no power, and that he is an executor, and is, therefore, to be complained of because he was not qualified?

Mr. Blaikie: Same objection.

A. I qualified that by the word usurpation; that he was not by Mr. Fayerweather's will.

1174 RD-Q. Do you want him by usurpation to act as executor? A. Do I want him?

1175 RD-Q. Yes; do you want him by usurpation to act as executor?

Mr. Blaikie: Same objection.

A. I want to do exactly what I think Mr. Fayerweather would like to have me do if he was here.

1047 If there has any prayer in my heart gone earnestly to the throne of grace since I have undertaken this, it is that I should be directed to know what was my duty to Mr. Fayerweather and Mrs. Fayerweather.

1176 RD-Q. It has been your wish from the beginning, so far as Mr. Ritch is concerned, has it not, that Mr. Ritch did not do anything as executor?

Mr. Blaikie: Same objection.

A. It has been my wish that he should take a seat that he ought to take, and I am trying to get the law to make him take it.

1177 RD-Q. To do nothing as executor? A. To do whatever the law provides that Mr. Ritch's

1048 legal position in it is, but I do not think and I have tried to sustain my idea, that he has any right to occupy the chair that he is occupying as executor of Mr. Fayerweather's estate.

1178 RD-Q. He never has had that right?

Mr. Blaikie: Same objection.

A. He never has had that right in equity.

1179 RD-Q. Was your complaint that he did not do things which you complained as executor he ought to do, a complaint in equity?

Mr. Blaikie: Same objection, not the best evidence, calling for the contents of a document which is not here.

A. I found the affairs of Mr. Fayerweather and Mrs. Fayerweather in the hands of parties which should not have control of it, and all the way through in every way that I saw it was consistent, on the advice of counsel, I have tried to sustain that position.

1180 RD-Q. By parties, do you mean Mr. Ritch and also Messrs. Bulkley and Vaughan?

1049

Mr. Blaikie: Same objection.

A. I do, but I do not charge Mr. Bulkley as having any hand in the plot; I think he has been a very weak executor and a very weak man, and in that respect a guilty man.

1181 RD-Q. Then, upon the record you stand in the position of having both complained that the executors should act at all as executors; and then, that as executors they have not done all that they should have done; does it come down to that?

Mr. Blaikie: Same objection.

1050

A. My standing on the record, if I understand it correctly, might be illustrated as being on a ship on which there was mutiny and I a passenger, and in order to get ashore and protect myself I have to submit to the people who are in authority and running the ship, which they have no right to do; when they got into port they are hauled into court; and I have get the crew that have been mutinous in court, and I am trying to have the Court decide what their standing is.

1182 RD-Q. Then your claim in equity is both that the crew should have sailed the ship, and that they ought not to have sailed the ship?

Mr. Blaikie; Same objection.

A. As a passenger on the ship it was my duty to help get the ship ashore, under the direction of the authority in power.

Mr. Parsons: That is all.

RE-RECROSS EXAMINATION by Mr. Blaikie:

1183 Re-x-Q. The negotiations you have referred to with Mr. Ritch and these other gentlemen, in regard to the tomb, took place before or after the Court
1051 of Appeals of this State had decided that they were executors, which? A. I think wholly before the decision of Judge Pryor.

1184 Re-x-Q. You say you think wholly before the decision of Judge Pryor; the decision of Judge Pryor was entered on the 7th of July, 1897, the Court of Appeals had handed down its decision early in the year; were those negotiations after the decision of the Court of Appeals or before? A. After.

1185 Re-x-Q. All after? A. Yes, sir.

1186 Re-x-Q. And the steps taken by you prior to that, to oust the executors, were steps that you at that time had done all you could——

1052

Mr. Parsons: Wait one moment.

Mr. Blaikie: Question withdrawn.

1187 Re-x-Q. The suit brought by the widow in the first instance, and later brought by the five colleges, in both these suits the position of the widow in the first, and yourself as executor, in the second, was that these three men were or were not the rightful executors of Mr. Fayerweather's will; which?

Mr. Parsons: We object upon the ground that the testimony, to begin with, is not relative to the issue; next,

upon the ground that the pleadings in the suit speak for themselves and show in the proceeding upon the probate of the will the fact that the executors were such, and we claim that they held the estate in trust, and that the witness is not to be permitted to testify to the reverse of that.

1187 Re-x-Q. read by stenographer.

A. Well, I don't know whether that question was involved in that suit, whether they were or were
1053 not; I think it was that they were not.

Mr. Parsons: The answer is objected to upon the ground that the witness having said that he does not know whether it was or was not involved, that ends his right to testify upon the subject, more particularly in view of the fact that the suit has proceeded upon the idea that they were executors.

The Witness: My difficulty was in hunting out exactly what the question referred to. The suit that Mrs. Fayerweather brought did proceed upon that ground, the suit which the five colleges brought did not proceed upon that ground, and we were complainants in one and defendants in the other.

1054

1188 Re-x-Q. After the decision of the Court of Appeals came down, while you felt that you ought to respect or regard it so far as protecting the tomb in the way you believed it ought to be protected, by dealing with these three men as having authority in the matter, were you at the same time taking any steps to question their authority and to have it determined by any further court whether or not they had any, or did you take any such step before the order of Judge Pryor was signed?

Mr. Bovee: That question is objected to as incompe-

tent, and calling for the conclusion of the witness and of the facts; the best evidence is the papers themselves filed by the witness in any proceedings taken by him.

A. Yes, we began a suit before the decision of Judge Pryor, as I remember.

1189 Re-x-Q. What suit? A. The suit in the United States Court.

1055

1190 Re-x-Q. The suit under which the present testimony is being taken? A. I so understand it.

1191 Re-x-Q. In the conferences concerning the tomb with these three men, during the time Mr. Dayton was taking testimony, did any part of the conferences pass into writing; did you receive any letter from Mr. Ritch or Mr. Bulkley or Mr. Vaughan concerning the tomb—one or more letters? A. While the proceeding before Mr. Dayton was going on, before it was consummated, I think I did.

1192 Re-x-Q. Have you such a letter in your possession, or letters? A. I have.

1193 Re-x-Q. Please produce such as you have? A. A letter of June 15th, 1897, from William C. Wallace.

1056

1194 Re-x-Q. To whom? A. John B. Reynolds, 11 East Fifty-seventh street.

Mr. Blaikie: I offer the letter in evidence.

Mr. Parsons: It is objected to, as is all testimony upon the subject objected to, that it has no conceivable relation to the issue in the suit,

The paper was admitted in evidence and marked Complainants' Exhibit No. 2, May 21, 1902, C. B.

Exhibit No. 2 is as follows:

"RITCH, WOODFORD, BOVEE & WALLACE,
18 Wall Street,
NEW YORK, June 15, 1897.

Mr. JOHN B. REYNOLDS,
11 East 57th Street.

DEAR SIR:

1057

I enclose herewith copy of a report made to Mr. Ritch concerning the repairs to the Fayerweather vault. The man who makes this report is an expert sent there upon the recommendation of Sinclair & Co., large stone cutters in this city. Let me know what suggestions you have to make in connection with the matter.

Yours truly,
WILLIAM C. WALLACE."

1195 Re-x-Q. You also had with that an enclosure, did you not? A. Yes.

1196 Re-x-Q. Is this paper I have in my hand the enclosure? A. Yes.

1058

Mr. Blaikie: I offer that paper in evidence.

Mr. Parsons: Same objection.

The paper was admitted in evidence and marked Complainants' Exhibit No. 3, May 21, 1902, C. B.

Exhibit No. 3 is as follows:

"NEW YORK, June 11th, 1897.

REPORT OF THE FAYERWEATHER VAULT.

The vault seems to have been neglected for years, and

every joint in the roof is partially open. The rain has free access to the interior.

In my judgment there are two ways of remedying it; first, the least expensive way is to cut all joints to a depth of three inches by ¼ inch, fill two inches with oakum, the other inch with Portland Cement carefully done.

The joints in walls of buildings are also destroyed by water from roof, and should be treated in the same manner without the oakum. The steps, and in and
1059 around the entrance are leaning toward the building and require to be cut on outside to keep water going into vault.

All the inside requires to be rubbed and polished over. One marble lintel inside is broken and should be replaced by a new one. The whole building requires to be cleaned and made to look fresh.

THE OTHER WAY.

To insure definite results take whole roof off and rebed with best Portland Cement, then treat it in former manner throughout.

The cost of first treatment would be $1,200.

1060

The cost of second treatment would be $3,000, which I do not think it wise to spend.

My best judgment is that the first treatment would give a dry vault.

Respectfully,

DAVID CREAR,

237 W. 105th St."

1197 Re-x-Q. Did you receive a letter from Mr. William C. Wallace dated June 22, 1897, at or about that time? A. I did.

1198 Re-x-Q. Is this the paper you have handed me? A. Yes.

Mr. Blaikie: I offer that in evidence.

Mr. Parsons: Same objection.

The paper was admitted in evidence and marked Complainants' Exhibit No. 4, May 21, 1902, C. B.

Exhibit No. 4 is as follows:

"RITCH, WOODFORD, BOVEE & WALLACE,
18 Wall Street,

1061

NEW YORK, June 22, 1897.

J. B. REYNOLDS, Esq.,
11 East 57th St.
New York City.

Dear Sir:

I have been ill and an answer to yours of the 16th has been delayed. Mr. Ritch has no other wish in the matter of the Cemetery than to have the repairs properly made. He has had a conversation with Mr. and Mrs. Beardsley and has succeeded in obtaining the consent of Mr. John J. Sinclair, who has had very much ex-
perience in stone work, doing most if not all
1062 of the work for the Vanderbilt family, in-
cluding work which is now being done for them on Staten Island, to take personal charge of the work in this case and to see that it is done in the best possible manner, as if it were work done for himself. Mr. Ritch has told Judge Beardsley and Mr. Sinclair that he had no interest in saving expense in this matter; that his chief concern was that the work should be well and thoroughly done. At his suggestion the sum of $12,500 has been named in Mr. Dayton's report, which is $2,500 more than the sum named by you in your letter some time since. I will add that

Mr. Ritch had been only waiting before assuming responsibility in this matter for the confirmation of the Referee's report and the entry of the final decree in the suit. When this is done he states that he will be willing to have a personal interview with you, or will place you in communication with Mr. Sinclair.

Yours respectfully,

WILLIAM C. WALLACE."

1063

1199 Re-x-Q. Mr. Reynolds, will you explain your remark in regard to your impression of Judge Pryor's decision, made a few minutes ago, as to what you meant by that? A. In regard to the fact that I did not care for it? So far as related to that tomb I did not think it had any effect; my great anxiety was to have the tomb put in proper shape by somebody, and at once.

1200 Re-x-Q. Was Judge Pryor's decision made after you had commenced the present suit in the United States Court? A. Yes, sir, after that provision was put in his decision, and no opportunity has ever been given to me, that I recall, to take any part or have anything to say as to what should be done with the tomb, but that Mr. Ritch did go to Mr. and Mrs. Beardsley

1064 and consulted them with regard to it, entirely ignoring the representative of the parties to whom he had agreed to convey it in consideration of those releases.

Mr. Blaikie: That is all.

By Mr. Parsons:

1201 RD-Q. Do you not see that by the letters which you have now introduced in evidence that Mr. Ritch took proceedings for the repair of the tomb immediately succeeding the arrangement in that regard, and that Mr. Wallace did act as an intermediary between you and Mr. Ritch, and that in his letter of June 15, 1897,

Mr. Wallace invited suggestions from you, and that in his letter of June 22, 1897, he stated that Mr. Ritch was willing to have a personal interview with you?

Mr. Blaikie: Objected to as incompetent, immaterial and outside of the issues raised by the special plea, and not the best evidence.

A. The letter first referred to covered the enclosure which has been offered in evidence, I believe, and was the examination which I referred to in my
1065 letter which was offered in evidence at the last hearing. My letter of June 16th was an answer to Mr. Wallace's letter of the 15th, and to the enclosure just now offered in evidence. With regard to the proposal of Mr. Ritch through Mr. Wallace, in his letter of June 22d, where he says, "When this is done," referring to the confirmation of the Referee's report, "he," referring to Mr. Ritch, "states that he will be willing to have a personal interview with you, or will place you in communication with Mr. Sinclair." Now, Mr. Ritch has never given me that opportunity, but the moment he got that judgment ignored me entirely, and began to meet with the parties, which, I suppose, from the fact of his neglecting me entirely, he had succeeded
1066 in getting into the judgment as the owners of the tomb.

1202 RD-Q. Your course has been, is it not so, to object to have anything done by Mr. Ritch, and then to complain that he did not do anything?

Mr. Blaikie: Same objection.

A. I think any person occupying the position that I was in would do just as I have done—assume that he had some interest to protect and try and protect it.

1203 RD-Q. Mr. Reynolds, when you speak about some suit which challenged the position of the executors as such, do you not refer to the Fiero suit?

Mr. Blaikie: Same objection.

A. That was not my suit. I don't think I referred to it; I hadn't it in mind.

1204 RD-Q. Call attention, if it is within your power to do it, to anything in the litigation from beginning to end, except the Fiero suit, which challenges the position of the executors, as such?

Mr. Blaikie: same objection.

1067

A. My cross-bill in this suit, I should think, fully does that, and I think the first suit brought by Mrs. Fayerweather.

1205 RD-Q. Show anything in that suit which challenges the position of the executors, as such?

Mr. Blaikie: Same objection; not the best evidence; the pleadings are the best evidence.

A. I haven't the complaint before me; I don't remember whether it is in the record or not.

1206 RD-Q. You mean you won't swear that there is any such statement in the record?

Mr. Blaikie: Same objection.

1068

A. I will swear that I believe it is.

1207 RD-Q. That you believe it is? A. Yes.

1208 RD-Q. What we wish to know is whether you will put yourself on record as swearing that it is so?

Mr. Blaikie: Same objection.

A. That is my impression; I do not feel like undertaking to quote from it any part.

1209 RD-Q. In addition to any other errors in your

testimony, are you not compelled to recognize that you made this mistake; that you have claimed that there was a pleading or complaint in Mrs. Fayerweather's suit when all that ever was served during Mrs. Fayerweather's life was a summons?

Mr. Blaikie: Objected to on the grounds already stated, and there is no proof that he has made any such mistake as the question intimates; there is no ground for any such assertion; it is disrespectful to the
1069 witness and impertinent.

A. I do not think I am compelled to make any apology for my effort to tell the whole truth, without any concealment, at every opportunity. If mistakes have been made they have been made without intention, and I do not recall any that I now could say was a mistake.

1210 RD-Q. State then what the fact is as to whether or not there was or not a complaint or pleading in Mrs. Fayerweather's suit?

Mr. Blaikie: Same objection.

A. Well I may have referred to it as a complaint in some point in my testimony, or perhaps the the complaint had not been completed; we were in consultation with ex-Senator Edmunds, and William
1070 T. Holt was another attorney, and Mr. Blaikie, and whether the complaint had been drawn fully at the time of her death, I do not recall, but I do not think it had.

1211 RD-Q. Have you not heretofore testified that in that suit nothing was done except to serve a summons?

Mr. Blaikie: Same objection.

A. I do not think I have in that broad sense, that we didn't have conferences over it; I think I have

said that Mrs. Fayerweather had her attorney, General Holt, at her house, and talked this over very fully immediately after her return from California, and I think that he drew the power of attorney for her.

By Mr. Blaikie:

1212 Re-x-Q. From her to you? A. Yes.

By Mr. Parsons:

1071

1213 RD-Q. And you really think that assuming that to have been done, that justifies the appellation that you have given to it, the partial preparation of the complaint, do you?

Mr. Blaikie: Same objection.

A. Not that alone; no, sir.

By Mr. Blaikie:

1214 Re-x-Q. The summons that you speak of, Mr. Reynolds, was served five days before her death, was it not, on Mr. Bulkley, or about that time? A. I think so.

1072

1215 Re-x-Q. And after her death did you qualify as her executor? A. I did.

1216 Re-x-Q. And in that capacity did you and your then brother executor, Judge Beardsley, enter a suit against these three men who claimed to be executors of Mr. Fayerweather's last will, among other defendants? A. Yes, sir.

1217 Re-x-Q. And have you not reference to the complaint in that suit when you speak of asking to put them out as executors; that they had no right to the position? A. Yes, sir.

Mr. Blaikie: That is all.

By Mr. Parsons:

1218 RD-Q. In other words, when you swore to a com plaint in Mrs. Fayerweather's suit, the fact was that there was no such complaint, and that the only com plaint was in your own suit as executor?

Mr. Blaikie: Same objection.

1073

A. It was in the suit of Mrs. Fayerweather, revived by her executors, and the difference between your version of it and mine is simply as to the dates, which I did not dissect closely enough to please Mr. Parsons, and he made frequent efforts to confuse me in regard to it. It is clear to everybody what the case was and what the purpose of it was, and what the result was; and Mr. Parsons got a thousand dollars and Mr. Ritch got a thousand dollars out of me, extra costs in the suit, by having it discontinued, and the entire amount of the expenses amounted to about $4,000.

1219 RD-Q. Now, show anything in any complaint in your suit, the suit maintained by you as the executor of Mrs. Fayerweather, which challenges the
1074 position of the executors, as such?

Mr. Blaikie: Objected to on the same grounds; the complaint is the best evidence; it is not here. It is ten years ago and the witness is not expected to remember what is in a paper.

1220 RD-Q. The complaint shows that there was no such challenge?

Mr. Blaikie: I object to the statement of counsel.

1221 RD-Q. Point in it to anything which you claim constitutes such a challenge, if you can do so?

Mr. Blaikie: Do you remember the contents of the complaint on that point; do you or don't you?

The Witness: I don't think I have referred to it—characterized it as anything.

1222 RD-Q. Then it comes down to this, that you have been testifying about something that is contained in a paper, when you do not remember whether it is there or not, and when the record shows it is not there?

1075

Mr. Blaikie: There is no evidence the record shows any such thing; the question is misleading and impertinent.

A. I have a distinct recollection of the suits being brought, and of the expression of Judge Edmunds—Senator Edmunds, when the complaint was read over he struck his fist down on the table and he said "Those devils"; that was his expression referring to those executors.

By Mr. Blaikie:

1223 Re-x-Q. Your impression is that that complaint did ask to oust those executors; is it or is it not?

1076

Mr. Bovee: I object to it as incompetent and calling for the contents of a written paper.

Mr. Parsons: And furthermore, asking for an impression in order to give the opportunity to the witness to state, as an impression, what the record shows not to be the fact.

Mr. Blaikie: There is no evidence the record shows that, and the witness is at liberty to tell the truth as near as he can.

Mr. Parsons: Oh, yes, and to perjure himself if he likes.

Mr. Blaikie: The statement of counsel is insulting, and of course it is a privilege of his own for that matter, but the thing I want to get from you, Mr. Witness, is the truth, whatever it was; if you remember it state it; if you do not remember it, say so. State it as well as you can; it is some ten years ago.

1077

The Witness: The purpose of it was, as I understand it to cover every means to re-establish the position of Mrs. Fayerweather in it, as it was before she had been swindled by those releases; just what was complained of or what accusations were made against the executors, I do not distinctly recall, but I think that Senator Edmunds approved of every word of it at the time; I know he did.

Mr. Bovee: I move to strike out the entire answer of the witness as incompetent.

Mr. Blaikie: That is all.

JOHN B. REYNOLDS.

1078

Subscribed and sworn to before me this 4th day of June, 1902.

JOHN A. SHIELDS,
Examiner.

JAMES L. BISHOP, a witness called on behalf of the defendants, being duly sworn, testified as follows:

DIRECT EXAMINATION by Mr. Bovee:

1 Q. Mr. Bishop you are a member of the bar? A. I am.

2 Q. And have been for many years? A. Since 1869.

3 Q. Are you a member of the firm of Putney & Bishop? A. I was in the year 1897.

1079

4 Q. Were they the attorneys of record for the plaintiff in the suit of Amherst against Ritch? A. They were.

5 Q. Were they the only attorneys of record for the plaintiffs in that suit? A. Yes. I will qualify my answer; it is possible that some attorney may have appeared as the attorney of record in some stage of the proceedings for one of the five plaintiffs, but I do not recollect such to be the fact.

6 Q. Mr. Bishop, do you recall the motion before Judge Pryor to confirm the report of Charles W. Dayton, as Referee?

Mr. Blaikie: Objected to as immaterial, irrelevant and outside of the issues raised in the plea, and irrelevant.

A. Yes.

7 Q. On what date was the motion first brought up before Judge Pryor?

Mr. Blaikie: Same objection, and not the best evidence.

A. By reference to the register kept in our office at that time; I am able to say that it was the 25th of June, 1897.

8 Q. Were you present in court on that day in those proceedings throughout the time?

Mr. Blaikie: Same objection.

A. My recollection is that I was there at least a part of the time; the argument was conducted by Mr. Putney on behalf of the plaintiffs.

9 Q. Do you recall on that occasion seeing Mr. Blaikie in court.?

1081

Mr. Blaikie: Same objection.

A. I cannot recall the incident sufficiently to say that I saw him there.

10 Q. How about Mr. Sherman?

Mr. Blaikie: Same objection.

A. I am quite sure that both Mr. Blaikie and Mr. Sherman were there, but I have no distinct recollection.

11 Q. What is your recollection as to whether any motion was made on behalf of defendants for a postponement of the motion?

1082

Mr. Blaikie: Same objection.

A. My recollection is that such an application was made, and that the motion was adjourned.

12 Q. At whose request?

Mr. Blaikie: Same objection.

A. It was adjourned, according to my recollection, because the defendants objected that they had not the statutory time, and I think it was adjourned over by the Judge for that reason.

13 Q. Upon whose objection upon that ground?

Mr. Blaikie: Same objection.

A. The objection of Mr. Sherman.

14 Q. Representing whom?

Mr. Blaikie: Same objection.

A. Representing the heirs and next of kin.

15 Q. Did he not also represent John B. Reynolds, as executor of Mrs. Fayerweather?

1083

Mr. Blaikie: Same objection.

A. Yes, he was her counsel.

16 Q. When you say Mr. Sherman, you mean Roger M. Sherman? A. Yes.

17 Q. The gentleman who has acted as counsel for the complainants in this case?

Mr. Blaikie: Same objection.

A. Yes.

18 Q. To what time was the motion adjourned?

Mr. Blaikie: Same objection.

1084

A. To June 30th, according to our record.

19 Q. Were you present in court when the motion came up on the 30th of June?

Mr. Blaikie: Same objection.

A. I am not sure about that.

20 Q. What is your best recollection?

Mr. Blaikie: Same objection.

A. I think I was there.

21 Q. What is your recollection as to whether the de-

fendants in that action, John B. Reynolds, as executor of Lucy Fayerweather, and the defendants Emma S. Fayerweather and Mary W. Achter were represented by counsel?

Mr. Blaikie: Same objection.

A. I am not able to recall the occasion with sufficient clearness to state that I saw either Mr. Blaikie or Mr. Sherman there at that time, although I think it quite likely that they were there.

1085

22 Q. Mr. Bishop, at that time, or prior to that, did you prepare a draft judgment with a view to having the same entered as the final judgment upon the report of Mr. Dayton as Referee?

Mr. Blaikie: Same objection.

A. I did.

23 Q. What is your recollection as to when you prepared that, Mr. Bishop?

Mr. Blaikie: Same objection.

1086

A. I prepared it within a short time previous to the 30th of June, 1897.

24 Q. Did you have it printed?

Mr. Blaikie: Same objection.

A. Yes.

25 Q. And what did you do with respect to the notice of settlement of that judgment, if anything.

Mr. Blaikie: Same objection.

A. I prepared a notice of settlement of judgment,

which was also printed, and caused the proposed decree and notice of settlement to be served upon the attorneys for the various defendants who appeared.

26 Q. When did you cause that to be served, Mr. Bishop?

Mr. Blaikie: Same objection.

A. According to the entry in the register of Putney & Bishop, which I have here, and the proofs of service attached to the office copy of the proposed de-
1087 cree and notice of entry, the service was made on June 30.

27 Q. And when was the decree noticed for settlement?

Mr. Blaikie: Same objection.

A. For July 2d, at 10.30 A. M.

28 Q. Have you the original draft of that judgment, with the original notice of settlement, Mr. Bishop, with the proof of service?

Mr. Blaikie: Same objection.

A. I have.

Mr. Bovee: I offer it in evidence.

1088

Mr. Blaikie: Objected to on the same grounds.

The same was admitted in evidence and marked Defendants' Exhibit No. 1, May 21, 1902, C. B.

29 Q. Mr. Bishop, look at the paragraph marked five in this proposed judgment, and tell me if each of the copies issued by you for service, to be served upon the attorneys for the defendants, contained the same clause as contained there?

Mr. Blaikie: Objected to on the same grounds.

A. The papers were printed and the same edition was served upon each of the defendants. I notice that the word "Greenwood" in the fifth paragraph is stricken out, and the word "Woodlawn" is written in place. I presume that a similar alteration was made in each of the proposed decrees that were served.

30 Q. Now, in what respect did the judgment assigned and settled by Judge Pryor differ from this proposed judgment in regard to the provisions of paragraph five?

1089

Mr. Blaikie: Same objection, same grounds.

A. I produce a certified copy of the final judgment and, referring to the fifth paragraph of that judgment which corresponds to the fifth paragraph of the proposed judgment, I judge that the differences are as follows: The words "upon the consent of all the parties hereto" in the proposed judgment, are stricken out; the figures "$10,000" are changed to "$25,000," and the word "the" after "Woodlawn Cemetery Association" is erased, and in lieu of it is inserted "out of said"; and the word "of" immediately preceding "$2,000" is erased; in all other respects the

1090 final decree corresponds with the proposed decree as to that paragraph.

31 Q. Mr. Bishop, after the entry of the decree by Judge Pryor, did you have that judgment served on defendants' attorneys?

Mr. Blaikie: Same objection.

A. According to the register I referred to above, it appears that a copy of the final decree was served upon Bryan L. Winter, attorney for Anner Amelia Reynolds, and William Blaikie, attorney for Reynolds, and others, on the 8th day of July, 1897.

32 Q. With a notice of settlement ?

Mr. Blaikie : Same objection.

A. With a notice of entry.

33 Q. Mr. Bishop, was there ever any motion made in behalf of John B. Reynolds as executor of Lucy Fayerweather, or Emma S. Fayerweather and Mary W. Achter, to amend or resettle that judgment of Judge Pryor ?

1091

Mr. Blaikie : Same objection.

A. No.

34 Q. Or any appeal ever taken on behalf of either of those parties from that decree ?

Mr. Blaikie : Same objection.

A. No.

35 Q. On the 30th of June, at which time the motion for confirmation of the report of Mr. Dayton was adjourned, the motion was heard and there was argument upon the same, was there not, before Judge Pryor ?

1092

Mr. Blaikie : Same objection.

A. I do not recall any argument at that time ; there may have been some discussion of some of the conditions of this decree.

36 Q. Well, there was a hearing ?

Mr. Blaikie : Same objection.

A. There was a hearing.

37 Q. And the motion was submitted to him on that day ?

Mr. Blaikie: Same objection; also leading.

A. The decree was handed up to him for signature, and it was signed on that day.

38 Q. On the 30th, you don't mean that?

Mr. Blaikie: Objected to on the same grounds; do not lead the witness.

A. No, I beg your pardon, I thought you were speaking about the date of the settlement of the final decree.

1093

39 Q. No; I am speaking about the motion which had been adjourned from the 25th, as you testified, to the 30th; what proceedings were had before him on the 30th?

Mr. Blaikie: Same objection.

A. Well, I have no recollection of any discussion before the Judge on that day; if there was any on behalf of the plaintiffs it was conducted by Mr. Putney.

Mr. Bovee: You may cross-examine.

CROSS-EXAMINATION by Mr. Blaikie:

1094

40 x-Q. In many of your answers you say according to the record you swear thus and so; who made that record? A. It was made by the managing clerk in our office.

41 x-Q. All of it? A. Either by him or by some other person.

42 x-Q. Not by you? A. The entries to which I have referred in my direct-examination were not made in my handwriting.

Mr. Blaikie: I move to strike out all the answers of the witness that refer directly or indirectly to entries

in the docket, as incompetent, not the best evidence and immaterial.

43 x-Q. You have spoken of certain changes in the fifth paragraph of the decree in question; who made those changes? A. They were made after consultation with various of the attorneys who appeared in the case upon suggestions to meet their views.

Mr. Blaikie: I move to strike out the answer as not responsive, and ask that the question be repeated.

1095

43 x-Q. repeated by stenographer.

A. If you mean who made the changes from the language implied in the proposed decree, the fifth paragraph, to the language used in the same paragraph of the final judgment, I can only say that there was no physical hand that made the changes; each of the two documents were printed.

44 x-Q. But you have specified various changes, one of which was the words "upon the consent of all the parties" were stricken out; how did that come to be done? A. My recollection about the omission of those words is that the executors suggested that the

1096 executors would prefer not to have it appear that they consented, but the decree should be made not from their consent.

45 x-Q. And it was purely on the motion of Mr. Ritch and Mr. Bulkley and Mr. Vaughan, was it? A. That is my recollection, that it was according to their suggestion.

46 x-Q. Do you recall anything definite about that? A. Nothing very distinct in my mind about that, but that is my impression.

47 x-Q. Was there no motion made or objection made on behalf of the widow or next of kin to Mr. Fayer-

weather to having those words remain there? A. I have no recollection of it now, Mr. Blaikie, unless you can recall something.

48 x-Q. Do you know anything about the proof of service upon me more than it recites? A. Nothing more than the fact that the young man who swore to the affidavit was at that time employed in our office.

49 x-Q. In whose handwriting is the word "Woodlawn" changed here and substituted for "Greenwood"? A. I should think it was Alfred's handwriting.

1097

50 x-Q. Who is Alfred? A. He was the young man who made the affidavit, whose signature is Alfred T. Chegwidden.

51 x-Q. Do you know of any reason why the charge was made striking out "upon the consent of all the parties," other than such as was offered by and on behalf of Messrs. Ritch, Bulkley and Vaughan at any time? A. I do not.

52 x-Q. Do you know of any service of more than one copy of this paper in its present condition, or in anything near its present condition, upon me; will you look at your docket and see if that advises you of any such other, if you do not know? A. The final or the proposed?

1098

53 x-Q. The proposed? A. The entry in the docket is "Served proposed decree on various attorneys," naming them, and then "William Blaikie, attorney for Reynolds. Bryan L. Winters, attorney for Anna A. Reynolds."

54 x-Q. What date is the proposed decree? A. June 30t .

55 x-Q. Look carefully throughout the second half of June, please, and the first eight days of July following,

1897, and see if you find any other entry or any reference to any service of any other copy of that decree, exactly like that or with some changes, upon me, and state what you find? A. I find on the 6th of June, 1897, there was served upon you a copy of the Referee's report and notice of hearing; I find on the 8th day of July Mr. William Blaikie, an attorney for Reynolds, and others, was served with a copy of the final judgment.

1099

56 x-Q. Have you the proof of that service? A. No, I have not here.

57 x-Q. Do you know where it is? A. I don't know whether it is at my office or at the office of Mr. Putney.

58 x-Q. Did you make any search for it to-day? A. No.

59 x-Q. Were you asked to by Mr. Bovee or anyone else? A. No.

Mr. Blaikie: That is all.

REDIRECT-EXAMINATION by Mr. Bovee:

60 RD-Q. Mr. Bishop, what is your recollection as to whether, prior to the 30th of June, you served
1100 upon William Blaikie in that action any other judgment than that judgment which has been produced and marked in evidence here?

Mr. Blaikie: Objected to on the same grounds.

A. I have no recollection of the service of any other proposed decree than that which has been produced.

61 RD-Q. Do you know of any proposed decree being prepared by any other attorney in that case, other than yourself?

Mr. Blaikie: Objected to on the same grounds, and immaterial.

A. No.

62 RD-Q. Did you ever hear of any other judgment than that which was prepared by you?

Mr. Blaikie: Same objection.

A. Not in the Amherst College case.

63 RD-Q. These entries in your register, Mr. Bishop, when were they made?

1101

Mr. Blaikie: Same objection, and not the best evidence.

A. They were made in the regular course of business.

Mr. Blaikie: I move to strike out the answer as not responsive.

64 RD-Q. At the time the service purports to have been made?

Mr. Blaikie: Same objection, and as leading.

A. About that time.

65 RD-Q. And by whom?

1102

Mr. Blaikie: Same objection.

A. The handwriting in which these entries were made is the handwriting of Mr. Robert Maitland.

66 RD-Q. Was he a clerk in your office?

Mr. Blaikie: Same objection.

A. He was then and is now, and has been for twenty years.

67 RD-Q. And was it his duty to make these entries in your register?

Mr. Blaikie: Same objection.

A. Yes.

68 RD-Q. Is the clerk who purports to have served the paper with notice upon Mr. Blaikie still in your employ?

Mr. Blaikie: Objected to as immaterial and on the same grounds.

A. No, he is not.

1103

69 RD-Q. When you say that the change in the fifth paragraph in respect to its reciting the consent of all the parties was made by the executors, you mean executors or attorneys?

Mr. Blaikie: Same objection.

A. Their attorneys.

Mr. Bovee: That is all.

RECROSS-EXAMINATION by Mr. Blaikie:

70 Re-x-Q. Do you know of any notice having been given to me or Roger M. Sherman of any such pro-
1104 posed change, or such change; if so, what was that notice? A. My recollection is that Mr. Blaikie was present and active, and had very full information of every paper that was submitted to the Court at that time.

71 Re-x-Q. Will you swear that Mr. Blaikie at that time said one word in court in favor of that motion? A. I will not, but my general recollection is that Mr. Blaikie has been very attentive to the interests of his clients, and has examined with great care every paper that has been presented or filed in the course of this litigation.

72 Re-x-Q. But you do not know anything about what

Mr. Blaikie did at that time in that court room, if he did anything, do you? A. I cannot recollect just at this minute what was said by the counsel at the time of the presentation of this proposed decree; the fact is that the notice of settlement was given for the 2d of July and the decree was not entered until the 6th of July, and I am very strongly persuaded in my mind that during that time consultation was had with the counsel who were interested in the case as to the final form of decree; and among others, a con-
1105 sultation was held with Mr. Blaikie, but I am not sure of it.

73 Re-x-Q. Cannot this strong persuasion in your mind as to the consultation with Mr. Blaikie be stretched a little further, and show where the consultation you refer to was had with Mr. Blaikie? A. No, it cannot.

74 Re-x-Q. How long was the proceeding which took place before Justice Pryor at the time of the settlement of this proposed decree? A. That I cannot recall.

75 Re-x-Q. Do you recall any one who was present at it besides Judge Pryor, Mr. Putney, Mr. Sherman and Mr. Blaikie? A. No: I could not specify with any certainty at this length of time.

76 Re-x-Q. Do you know a lawyer named McRae; he was on one of the benches at one time? A. I
1106 know a Mr. McRae, an attorney, who was formerly a partner of Mr. Kelly; the firm of Kelly & McRae.

77 Re-x-Q. What is his first name? A. I cannot recall his first name.

78 Re-x-Q. Do you recall whether he was in the room at that time? A. I have no recollection about it.

Mr. Blaikie: That is all.

RE-REDIRECT-EXAMINATION by Mr. Bovee:

79 RD Q. Mr. Bishop, you have referred to Mr. Blaikie's connection with the case; do you recall a meeting of the counsel in the case before Judge Truax shortly after he announcod his decision in that case?

Mr. Blaikie: Objected to on the same grounds.

A. I recollect a meeting of the counsel in the case at the time Judge Truax orally announced his decision.

80 RD-Q. On that occasion he did announce his decision in the case in favor of the plaintiffs, did he?

Mr. Blaikie: Same objection, not the best evidence.

A. Yes.

1107

81 RD-Q. Did you see at that time Mr. Blaikie present!

Mr. Blaikie: Same objection.

A. Yes, I saw Mr. Blaikie; I remember distinctly seeing Mr. Blaikie.

82 RD-Q. Was anything said by Judge Truax on that occasion with reference to the decision of the Court, and findings, and if so, what was said?

Mr. Blaikie: Objected to on the same grounds, and as incompetent.

1108

A. Judge Truax said that he had come to a decision in the Fayerweather case; that since the case had been submitted to him there had been an amendment to the Code which permitted the entry of what we now call a short judgment instead of the findings of fact and conclusions of law which were formerly necessary; he said that he had been presented with requests to find, by the plaintiffs, and by several of the defendants, and he wished to know whether the parties preferred that he should make the findings of fact and conclusions of law, or whether he should make a short form of decision, stat-

ing generally the grounds. After some little period of quiet discussion of counsel among themselves, the attorneys for the plaintiffs stated that they preferred that a short form should be entered; that was acquiesced in by all the other attorneys present, including Mr. Blaikie. I am not sure that the attorneys for the plaintiffs spoke first on that subject, but I know that there was an entire acquiescence of all the attorneys in the entry of the judgment in that form, and no one dissented.

1109

83 RD-Q. And at any time thereafter, Mr. Bishop, was there any request made by any of the parties to the litigation for specific findings?

Mr. Blaikie: Same objection.

A. Not to my knowledge.

RE-RECROSS-EXAMINATION by Mr. Blaikie:

84 Re-x-Q; Was I at that interview with Judge Truax? A. Were you there personally?

85 Re-x-Q. You swore Colonel James was and then you withdrew it. A. My recollection is very distinct that Mr. Blaikie was there, but I am not so positive that Colonel James was, although it is my impression that he was there.

1110

86 Re-x-Q. Do you recollect distinctly what took place there at that time? A. I think I have a very distinct recollection of it.

87 Re-x-Q. Did I ask Judge Truax any questions? A. I do not recall any just at this moment.

88 Re-x-Q. Yet you say you have a distinct recollection of what took place there. A. I have a distinct recollection of the general circumstances, as I have testified to.

89 Re-x-Q. Do you not recall I asked Judge Truax how about the widow and nieces, and in reply he said,

"I consider that they get $310,000 they had no right to," that it was the same as money found. Do you not recall that? That took place, do you recall it? A. I recall something of that sort, but I cannot recollect distinctly that you spoke to Judge Truax as you have stated, or that he replied in the language that you have quoted, or in language similar in effect.

90 Re-x-Q. Well, he replied in those words. But was anything said at that hearing about costs or extra allowance; you say you have a clear recollection of
1111 what took place; now what do you say about that? A. Yes, I think there was.

91 Re-x-Q. What was said? What costs, if any, did the Judge state for extra allowance that he would award to the plaintiffs in that action, and what extra allowance did he award to them?

Mr. Bovee: Objected to as incompetent; the judgment is the best evidence.

A. I cannot answer with certainty.

92 Re-x-Q. Say your best? A. My best recollection is that he awarded costs to the plaintiffs.

93 Re-x-Q. Extra allowance, and how much and to whom? A. He awarded some allowance—my
1112 recollection is that some allowance was made by Judge Truax to the counsel for the widow and next of kin.

94 Re-x-Q. I asked about the counsel for the plaintiffs; what extra allowance did he give them? A. I will have to refresh my recollection.

95 Re-x-Q. Didn't he give them $2,000; that is my memory on it? A. That is my memory on it.

96 Re-x-Q. Do you not know Mr. Lockwood, of Lockwood & Hill, and was he not there at that interview? A. My recollection is he was.

97 Re-x-Q. Did he speak up; what did he say? Did he not ask for an extra allowance himself? A. I think he did, for Trinity College.

98 Re-x-Q. Did not Judge Truax ask him who he was, he didn't seem to know him, and did not Judge Truax refuse to give it to him and say, "I propose to give extra allowance to the men that did the work; I shall give Mr. Blaikie $1,000." Did not Judge Truax say that? A. My recollection is, as I said, that an allowance was made to the widow and the next of kin.

99 Re-x-Q. Was he not interrupted by Mr. Kiddle asking for an allowance for the Northwestern, at that stage, and did he not give him $100 and say he would take it off mine; do you recollect that? A. I
1113 recollect Mr. Kiddle speaking up and asking for money; I recollect that.

100 Re-x-Q. Did he not also award Mr. S. P. Nash $1,000? A. Yes, I recollect that.

101 Re-x-Q. And didn't I humbly suggest that he take Kiddle's $100 off Mr. Nash's instead of mine, and did he not leave it off mine? A. I don't remember that. As you ask these questions I remember now that an allowance was made, as I have stated, to the widow and next of kin, to Mr. Nash and I think to Mr. Kiddle.

Mr. Blaikie: That is all.

JAMES L. BISHOP.

1114

Sworn to before me this
10th day of June, 1902.

JOHN A. SHIELDS,
Examiner.

Mr. Bovee: I wish to have the minutes corrected to show that the defendants offer in evidence the complete record of the opinion of Judge Follett from the 91 Hun, from the syllabus of the case down to the end of Judge

Follett's opinion; and also all of the record of the opinion of the Court of Appeals, in the 151 N. Y., from the syllabus of the opinion in the case down to the end of Judge Vann's opinion.

Mr. Blaikie: Objected to as not the best evidence and as incompetent.

[DEFENDANTS REST.]

1115

1116

Cross-examination of Hon. Alton B. Parker.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another,
1117 Complainants,
AGAINST
THOMAS G. RITCH and others,
Defendants.
} In Equity.

JOHN B. REYNOLDS, as sole Executor of the Estate of Lucy Fayerweather, deceased,
Complainant,
1118 AGAINST
THOMAS G. RITCH, &c., and others,
Defendants.
} No. 6675.

Upon reading and filing the affidavit of William Blaikie, sworn to the 23d day of May, 1902, and the order to show cause, dated the 23d day of May, 1902, and upon the deposition of the Hon. Alton B. Parker, Chief Judge of the Court of Appeals of the State of New York, filed in this Court on the 14th day of May, 1902, and upon the notice of the taking of said deposition

served upon William Blaikie and Roger M. Sherman, attorneys for the complainants, on the 7th day of May, 1902, and it appearing that at the time fixed for the taking of said deposition the complainants did not appear, and that said witness was examined by counsel for the defendant only, and after hearing William Blaikie, of Counsel for the motion, and C. N. Bovee, Jr., in opposition, it is

Ordered, that the complainants have leave to cross-examine Hon. Alton B. Parker, at the Chambers
1119 of the Court of Appeals, at the Capitol, at Albany, on May 27, 1902, at 11.30 A. M., and thereafter from day to day, as the taking of his deposition may be adjourned; and it is

Further ordered, that as a condition for granting said motion, the said Clerk of this Court deliver said deposition filed with him on the 14th day of May, 1902, to C. N. Bovee, Jr., one of the counsel for defendants, to be taken by him to Albany to be used upon said examination, and that at the conclusion of said examination said deposition be delivered to said C. N. Bovee, Jr., to be returned by him forthwith to the Clerk of this Court, such cross-examination to be had before the said Thomas Newcombe as notary public, pursuant to and under the said notice given by the defendants, and that
1120 in case said Newcombe cannot take said deposition, then that said examination be had before some other notary to be designated by defendants' counsel.

Dated New York, May 24, 1902.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another,
Complainants,
1121 AGAINST
THOMAS G. RITCH *et al.*,
Defendants.
} In Equity.

JOHN B. REYNOLDS, as sole Executor of the estate of Lucy Fayerweather, deceased,
Complainant,
AGAINST
THOMAS G. RITCH *et al.*,
1122 Defendants.
} No. 6675.

THE UNITED STATES OF AMERICA,
Southern District of New York,
State of New York,
County of Ulster,
} ss.:

CROSS-EXAMINATION of Chief Judge ALTON B. PARKER, taken at Rosemount, in the Town of Esopus, Ulster County, New York, in pursuance of an order made by the Honorable E. H. Lacombe, United States Circuit Judge, dated the 24th day of May, 1902.

Present, WILLIAM BLAIKIE, Esquire, of counsel for complainants Emma S. Fayerweather and another against Ritch, and JOHN B. REYNOLDS, as sole executor of the estate of Lucy Fayerweather, deceased, complainant, against THOMAS G. RITCH, in the cross-bill; and C. N. BOVEE, Jr., Esquire, for defendants.

It is hereby stipulated that the cross-examination of Chief-Judge Parker may be at Rosemount in the Town of Esopus, in Ulster County, and not in the City of Albany, as provided in the original no-
1123 tice and order. That such cross-examination be had before Thomas Newcomb, as notary public, as provided for in said notice and order. That the cross-examination of Chief-Judge Parker has been duly adjourned from the 27th day of May, 1902, the time fixed in the order for such examination, to the present time. That such cross-examination and deposition when written out by the stenographer may be signed by Chief-Judge Parker and transmitted by him to Mr. Newcomb, to be duly certified and returned by him forthwith to the Clerk of the United States Circuit Court for the Southern District of New York. That the cross-examination of Chief-Judge Parker may be taken
1124 down by the stenographer and written out by typewriter in lieu of longhand.

Q. How recently have you read the record which was before you in Amherst College *v.* Ritch? A. I have not read the record since the time of the decision.

Q. Has your answer to the last question in chief been given from the general impression remaining in your mind of the record as it left your General Term, or have you since giving your decision refreshed your memory on the subject, and if so, when and in what manner? A. Yes, my memory was refreshed by an ex-

amination of the briefs and by an examination of the opinions of Judge Follett and Presiding Justice Van Brunt.

Q. Do you mean to be understood in giving your last answer in chief that the three Judges at General Term considered in consultation and decided that none of the evidence adduced by the widow or next of kin before Judge Truax had any legal tendency to establish the charges of fraud or other charges set up by them in their answers to impeach the settlement and their
1125 releases? A. My recollection is not very distinct of course, but it is not that there was not any evidence, but that there was not sufficient evidence to impeach them.

Q. If yea, was any distinction desired by any of the judges between evidence adduced by or affecting the nieces as distinct from that adduced by or affecting the widow? A. I do not recollect that there was.

Q. Do you recollect the fact that Justice Van Brunt in his opinion held that the nieces had no standing to impeach the disposition made by Mr. Fayerweather of his property in excess of one-half, and that the right to do so was confined to the widow? A. That is my recollection of the opinion and his position.

1126

Q. Did the Justices at General Term differ in respect to the relevancy and weight of the evidence adduced to impeach the settlement and releases accordingly as such evidence affected the claim of the widow and the claims of the nieces? A. It is my impression that there was no difference in that respect.

Q. Did Justice Van Brunt give any consideration to the evidence adduced to impeach the settlement and releases in behalf of the nieces and more particularly relating to the discharge of their claim to impeach the trust under the will? A. I cannot say, of course; but

whether he did or not, my impression is that there is no discussion in his opinion of the evidence bearing upon the nieces' claims.

Q. Was there any consultation by him, any such discussion? A. I do not recollect it.

Q. Or by his brother justices? A. I do not recollect now any special discussion of the evidence offered for the purpose of impeaching the releases in which the position of the nieces was considered apart from that of the widow.

1127

Q. Did Justice Follett and you consider the relevancy and weight of any evidence adduced to impeach the settlement and releases more particularly affecting the nieces as distinguished from any such evidence considered by Justice Van Brunt in association with his idea that the only relevant question of fraud was fraud practiced upon the widow? A. Mr. Justice Follett and myself were at that time, as at other times while we were members of the court in New York, living together, and I recollect that we had discussions of this case together and that the evidence as a whole was considered, but the details of it I do not now recall.

1128

Q. Do you mean to be understood that two of the Justices having reached the conclusion that both the widow and nieces were upon the same footing as regards their impeaching the secret trusts, and the other Justice having reached the conclusion that only the widow had such standing, that, nevertheless, all three Justices considered indiscriminately, and without regard to their respective opinions concerning the right of the two parties to be heard at all, all the evidence to impeach the settlement and releases whether that affecting the claim of the widow or that of the nieces? A. I think I

have already said in answer to the previous questions that I was not able to state what position Presiding Justice Van Brunt took with reference to the testimony bearing upon the claim of the nieces.

Q. Did all three Justices consider indiscriminately, and without regard to their respective opinions concerning the right of the two parties to be heard at all, all the evidence to impeach the settlement and releases whether that affecting the claim of the widow or that of the nieces? A. My answer to that must be substantially as to the other questions. I say that the discussions took place between Judge Follett and myself, as was our usual custom, at our rooms. I am unable to recollect whether Presiding Justice Van Brunt weighed the evidence specially which was offered in behalf of the nieces or not.

1129

Q. Did you understand from Justice Truax's opinion and decision or both and from the record before him that he considered the main question to be as to whether the method adopted by Mr. Fayerweather to accomplish his testamentary wishes had been successfully placed outside of the condemnation of the statute of wills?

Objected to as irrelevant, immaterial and incompetent.

1130

A. I have not read Judge Truax's opinion since about the time of the decision of the General Term, but that is my recollection of his decision as disclosed by both opinion and decision.

Q. Did you understand therefrom that all the evidence received on behalf of the widow and next of kin was taken subject to his ruling upon the proposition that what was called the residuary estate had been successfully disposed of in his lifetime by a secret trust

which avoided the condemnation of the Statute of Wills?

Objected to as irrelevant, immaterial and incompetent, and the record is the best evidence.

A. If that is the fact I undoubtedly did not know it, but I do not now recall it.

Q. Did you understand that such was the theory of the complaint of the five colleges plaintiff?

1131

Same objection.

A. I do not recollect any such understanding.

Q. Did you understand that such was the theory upon which the counsel for the plaintiffs presented the case to Justice Truax?

Same objection.

A. Not that I recollect.

Q. Was not that the theory upon which the plainiffs presented their contention to the General Term and upon that sought to sustain the judgment before you?

1132

Same objection.

A. I do not recall it.

Q. Did you understand Justice Truax's opinion to mean, so far as he was concerned, that he approved the theory of the complaint, and that he considered that the secret trust was enforceable notwithstanding the Statute of Wills, and that therefore no interest in the residuary estate passed to the widow or next of kin, and that therefore, they having no interest to release,

it was not a matter of judicial consequence how their releases had been obtained?

Same objection.

A. My best recollection at this time is that I did so understand it.

Q. Did not the General Term Justices consider that they were sustaining the judgment upon that theory and did they intend to do so? A. I should say not.

My recollection, as refreshed by reading the opin-
1133 ion of Mr. Justice Follett, is that the conclusion of the majority of the Appellate Division was that the secret trust was enforceable. And that the Act of 1860 was in operation as to it in favor of parties named in that statute who might be in a position to enforce the statute. But that the widow in this case, by virtue of her release, was not in that position, and hence it became necessary to consider whether the release had been attacked by such evidence as would justify the Court in holding that it was successfully impeached.

Q. Did the General Term give any consideration to the question whether it was within their judicial competency to review upon appeal a judgment rendered upon the theory stated in the last question but
1134 one, and thereupon decided that the theory of the action and the theory upon which the plaintiffs succeeded and the theory upon which they were contending before the General Term to uphold their judgment, being the theory adopted by the Court below, was an erroneous theory, and that plaintiffs had no rights based thereupon, but must be defeated so far as they went, and yet finding that error, affirmed the judgment? A. I think they did, and necessarily were led to do so on the theory that the evidence did not require a finding that the releases were fraudulently procured.

Q. Had it not previously been the settled law of New York State that when the theory of the action being the

essence of the claim to recover was by the Appellate Court held to be erroneous that due process of law in its ordinary administration in the courts of New York required that the judgment should be reversed and the complaint dismissed or at least the case sent back for further proceedings looking to the placing of plaintiff's claim upon a sound basis by amendment or otherwise, so that it might be certain at any subsequent trial that the consideration of the evidence by the Court should be controlled by the claims made in the com-
1135 plaint and responsive pleadings by the defense?

Objected to as incompetent and Chief Judge Parker is not and ought not to be called upon to express his opinion as to matters outside of the record in this case.

A. That is the general but not the inevitable rule of law in this State. Appellate courts, both in the Appellate Division and the Court of Appeals, occasionally refuse to send back a case where it is plain from the record that no different result can ensue.

Q. Did the Justices of the General Term give any consideration to the limitation of their power arising from the fact that inasmuch as Justice
1136 Truax had decided that it was his duty to ignore the issues presented bearing upon the validity of the releases of the widow and next of kin that the consideration of that evidence for the first time at General Term rendered essential by the condemnation at General Term of the theory of the action and judgment below failed to accord to the widow and next of kin whatever legal value there is in having the issues of fact decided by the Judge who sees the witnesses? A. I do not think any member of the Court questioned the power to make the decision as it was made.

Q. Is it not true that the consideration given by the General Term to the evidence adduced to sustain the attack

upon the settlement and releases was based upon the view that under the then recent amendment to Sec 1022 of the Code of Civil Procedure that the Court was empowered to decide *de novo* questions of fact upon appeal where a general exception was taken by a short form of decision not that of the section? A. I do not recall that that question was considered.

Q. Is it not true that such consideration as was given to such evidence by the General Term Justices was in the exercise of a proposed power, notwithstanding the fact that Justice Truax had not passed upon the
1137 effect of such evidence of fraud, by Section 1022 upon the Appellate Court to decide those questions with the same force as a court of original jurisdiction? A. I do not recall that there was anything said about Section 1022.

Q. Did the General Term Justices in point of fact, as evidence by what passed at consultation, actually consider the proof in the record before them adduced to support the claim of the nieces and widow that the settlement and releases being obtained in the manner stated for both in their respective answers, that is, by willfully suppressing from the widow and next of kin and from their counsel proofs known and possessed by them alone, that these ladies were the owners of all above one-half of the estate and above the small
1138 specific bequests to individuals; by wilfully and falsely representing to them that said three men were the absolute owners of that residue and that no part of it belonged to these ladies when said three men knew all the time that they did not own a dollar of that residue but had taken it, as every court had found, upon a distinct promise upon which the testator fully relied that if he willed it said three men would not keep any of it but give it all to institutions, which promise they persistently strove to hide both from the Court and these ladies, then deliberately broke by deeding that residue not to said

institutions but to others of their own, not the testator's choosing, then notifying the widow and next of kin that they, these three men, had deeded it all away beyond recovery, then notifying the widow that they would eat up the entire estate in litigation and the entire private fortune of one of said three men before she should have a deed of it, while all the while they were keeping this wife of a multi-millionaire, who was near her own death from lingering disease, so completely
in their power that for months after her hus-
1139 band's death she actually had to borrow
money to pay for the food she ate, by then stating their terms, namely, that though she owned none of this residue they would give her about ten cents on the dollar of what they knew but she did not know was all hers, would keep the other ninety per cent. of several million dollars under this *nudum pactum*, keep her at their mercy until she came to terms, would increase her annuity, which for months she was receiving none of, and which the one of them who drew the will had thoughtfully so framed that will that she could only have any of it in their discretion; that they would deed to her the tomb in which she was to be buried beside her husband, instead of doing which
they lost all power, if any, that they ever had
1140 to do so by waiting until after his inter-
ment when the law ended all power to transfer said property and so obtained said settlement and releases from her, fraudulently withholding from her that which had she known she was to be deprived of it she would never have released, which releases though drawn by lawyers long familiar with the law studiously omitted all recital of the rights and interests they were releasing and which the widow could sign or remain at their mercy penniless. All of which was established by proof which has never been contradicted and that one of said three men has successfully hidden the true last will of said testator to

this defendant, substituting for it a codicil giving himself over one million dollars which he swore he owned absolutely and whom Justice Traux refused to believe under oath, and the opinion of the Court of Appeals gives fourteen reasons by which he was amply justified in that refusal. Did not the Justices at General Term mutually consider these and other proofs of fraud practiced by said three men upon the widow and next of kin as set forth in the pleadings and proof before Mr. Justice Traux by which they obtained said
1141 releases?

Objected to as incompetent.

A. The majority of the court did make such an examination of the record as satisfied their minds as to the facts, but the details I do not now recollect, and therefore, cannot further answer this question.

Q. Have you ever read the opinion of the Court of Appeals in this case?

Objected to as immaterial and irrelevant.

A. Yes, I have.

1142

Q. Did the Justices of the General Term obtain a different view of the proposition presented for decision by the record from the view apparent in the opinion of the Court of Appeals?

Same objection.

A. Well, it is a long time since I read the entire opinion of the Court of Appeals. I read it shortly after it came out, but my impression is that as to the questions covered in the opinion of Mr. Justice Follett, the opinion of the Court of Appeals, written by Judge

Vann, was in substantial accord. I think he discussed other questions, but as to those questions, I think there was no substantial disagreement.

Q. If you mean to be understood by your last answer in chief as saying that there was no evidence having a legal tendency to support the claim of the widow and next of kin to impeach the settlement and releases, do you recall the recital in the opinion of the Court of Appeals of such evidence and the conclusion therein in substance that the evidence was so far balanced

1143 that the Court of Appeals within the limitation by statute of its jurisdiction in their review of questions of fact were not empowered to say that the evidence of fraud so preponderated that as matter of law it was error to hold that the fraud was not made out?

Objected to as incompetent and not containing a correct statement of the testimony of Chief Judge Parker.

A. I do not recall the opinion of Judge Vann with sufficient definiteness on that point to be able to answer the question positively, but I think there was some consideration of the evidence in the opinion of the

1144 Court of Appeals, but necessarily only for the purpose of determining whether there was evidence upon which the courts below could act, for the Court of Appeals, of course, has no right to weigh one party's evidence as against another's. It is sufficient for that Court to find some evidence in support of the decision of the courts below.

Q. Can you state any fact or consideration to sustain the proposition that there is no evidence having any legal tendency to sustain the claim of fraud and which disposed of the evidence of fraud discovered in the record and disposed of in the manner stated in the opinion of the Court of Appeals?

Objected to as irrelevant, immaterial and incompetent.

A. I cannot undertake that at this time, as I have not sufficient and accurate recollection of the record to attempt such an answer.

REDIRECT-EXAMINATION by Mr. Bovee:

Q. Chief Judge Parker, I show you a copy of the brief of the widow, executors and next of kin in the case at General Term, and ask you, after examining
1145 the 13th point of that brief, if it was not a fact that the widow executors and next of kin in that case asked the Court to render an affirmative judgment in favor of those defendants upon the record before the Court? A. It so appears.

Q. Referring to the 10th point in the same brief: Was it not a fact that both upon the argument and in the briefs of counsel for the widow, executors and next of kin, the General Term was asked to declare the releases given by the widow of Mr. Fayerweather and the next of kin of Mr. Fayerweather fraudulent and void? A. I am unable to recall what took place on the oral argument, but the 10th point of the brief and its conclusion as well invite the Court to make the dis-
1146 positionsuggested by the question.

All that part of the answer after the words, "oral argument," is objected to as incompetent by Mr. Blaikie, and he moves that it be stricken out.

Q. Which of the two opinions rendered at General Term was the opinion of the Court, Judge Follett's or Judge Van Brunt's? A. Judge Follett's was the opinion of the majority.

Q. Is it not a fact that the testimony in the record in the case upon the question of fraud in the releases of the widow and next of kin was considered alike as applying both to the widow and next of kin? A. I shall

have to answer that as I did before. I have no distinct recollection of Presiding Justice Van Brunt's view on that subject, but as to Mr. Justice Follett's I am certain the evidence was all considered.

ALTON B. PARKER.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another,
1147 Complainants,
AGAINST
THOMAS G. RITCH *et al.*,
Defendants.
} In Equity.

JOHN B. REYNOLDS, as Sole Executor of the Estate of LUCY FAYERWEATHER, deceased,
Complainant,
1148 AGAINST
THOMAS G. RITCH *et al.*,
Defendants.
} No. 6675

I, the above named Thomas Newcomb, a Notary Public, do hereby certify that pursuant to an order of the Honorable E. Henry Lacombe, United States Circuit Judge, dated May 24th, 1902, in the above entitled action, a copy of which order is hereto annexed, in which action Emma S. Fayerweather and another are complainants, and John B. Reynolds, a sole executor of the estate of Lucy Fayerweather,

deceased, is cross-complainant, and Thomas G. Ritch and others are defendants, I was attended at Rosemount, in the Town of Esopus, in the County of Ulster, by William Blaikie, Esquire, counsel for the complainants Fayerweather and another and Reynolds, and by C. N. Bovee, Jr., Esquire, of counsel for defendants, on the 3d day of June, 1902, at 2:30 o'clock in the afternoon. That the aforenamed witness, the Honorable Alton B. Parker, was cross-examined by said Blaikie as counsel for the complainants, and that he thereupon testified as is above shown; that the deposition by him subscribed, as above set forth, was taken down
1149 by a stenographer in shorthand and written out on typewriter and subscribed as above set forth, and was subscribed by the said witness, and was taken at the place above mentioned pursuant to the stipulation of the parties; that it being impracticable for me to take said deposition and cross-examination with my own hand into the Court for which it was taken, I have retained the same for the purpose of being sealed up and directed with my own hand and safely transmitted to said Court for which it was taken, and to remain under my seal until then opened.

Witness my hand and seal this fourth day of June, 1902.

T. NEWCOMB,
Notary Public for the County
1150 of Albany, with certificate
filed in the County of Ulster.

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

In Equity.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Complainants,

1151 AGAINST

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN,
Defendants.

JOHN B. REYNOLDS, as Executor, &c., of LUCY FAYERWEATHER,
Complainant,

1152 AGAINST

THOMAS G. RITCH, JUSTUS L. BULKLEY and HENRY B. VAUGHAN,
Defendants.

UNITED STATES OF AMERICA, Southern District of New York, } ss.:

I, JOHN A. SHIELDS, an Examiner duly appointed by the Circuit Court of the United States for the Southern District of New York, do hereby certify that the foregoing are the proofs for final hearing taken before me in

the above entitled cause on the part of the defendants Ritch, Bulkley and Vaughan, individually and as executors, &c., under and pursuant to the 67th Rule of the Supreme Court of the United States as amended.

I do further certify that I am not of counsel nor attorney for either of the parties, nor in anywise interested in the event of the said cause.

I further certify that Messrs. Roger M. Sherman and Wm. Blaikie appeared on the part of complainants, and Messrs. John E. Parsons and C. N. Bovee, Jr., appeared on the part of said defendants in the taking of said proofs.

730 JOHN A. SHIELDS,
As Examiner.

731

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

IN EQUITY.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
1155 Complainants,

against

THOMAS G. RITCH, individually and as Trustee and Executor of the Last Will and Testament of Daniel B. Fayerweather, deceased, and others,
Defendants.

Before JOHN A. SHIELDS, Esq., Examiner.

NEW YORK, November 4th, 1898.

Testimony taken on behalf of the defendant Hamilton College under the 67th rule in equity, upon the issues joined upon the replication of the complainants to
1156 the plea and answer of the defendant Hamilton College.

APPEARANCES:

ROGER M. SHERMAN, Esq., Solicitor for Complainants.

Messrs. ROOT, HOWARD, WINTHROP & STIMSON, Solicitors for the Defendant, Trustees of Hamilton College.

ELIHU ROOT, Esq., ARTHUR C. HUME, Esq., and JAMES L. BISHOP, Esq., of Counsel.

WILLIAM BLAIKIE, Esq., Solicitor for John B. Reynolds, as executor of the last will and testament of Lucy Fayerweather, deceased.

DANIEL O'CONNELL.

DANIEL O'CONNELL, called as a witness on behalf of the defendant Hamilton College, being duly sworn, testified as follows:

Direct examination by Mr. Hume:

Q. You are a clerk in the county clerk's office, County of New York? A. Yes, sir.

Q. (Handing papers.) These papers which I show you are from the files of the county clerk's office? A. Yes, sir.

1157

Counsel for the defendant the trustees of Hamilton College stipulates that opposing counsel need not attend to register objections to the testimony, except objections to form, but may raise such objections after the testimony is taken and before the record is made up for argument, except to objections to form which could be removed upon their being taken at the time of the propounding of the question.

Mr. Hume.—I offer in evidence the exceptions filed to the decision of Justice Truax, at Special Term, Supreme Court, in the case of the trustees of Amherst College and others against Thomas G. Ritch
1158 and others

Said exceptions to the decision of Justice Truax are pages 910 to 961 of the printed case on appeal in Amherst College *vs.* Ritch.

It is stipulated that the papers in the printed case on appeal in the action by the trustees of Amherst College *et al.* against Thomas G. Ritch *et al.*, in the Supreme Court of the State of New York, a list of which is now delivered to the Examiner, be received and read from the said case with like force and effect as if the originals contained in the original judgment roll now produced from the office of the Clerk of the County of New York and filed in said office on De-

cember 31st, 1894, were received and read in evidence. This stipulation does not include the correctness of what purports to be the printed copy of the codicil of Danel B. Fayerweather, dated November 15th, 1890, and does not conclude the question of the relevancy, materiality or probative force of said evidence with reference to the issues herein.

The list of papers referred to in the foregoing stipulation is printed at folio 69 of this volume.

1159

By Mr. Root:

Q. Is this Book entitled "New York Supreme Court, General Term, First Department, the Trustees of Amherst College *et al.* against Thomas G. Ritch *et al.*, case on appeal to General Term," an original paper produced by you from the files of the Clerk of the City and County of New York? A. Yes, sir.

Q. The Clerk of the City and County of New York is the Clerk of the Supreme Court of New York in this County? A. Yes, sir.

Mr. Root.—I offer this in evidence.

Mr. Sherman—The whole of it?

1160 *Mr. Root.*—Yes, the whole case.

It is stipulated that a correct copy of the record, being the case on appeal to the General Term and the case on appeal to the Court of Appeals in the action of the Trustees of Amherst College and others against Thomas G. Ritch and others, now produced and identified by the witness, is on file in this Court, and may be referred to with like force and effect as the original now produced. This stipulation does not include the correctness of what purports to be the printed copy of the codicil of Daniel B. Fayer-

weather, dated November 15th, 1890, and does not conclude the question of the relevancy, materiality or probative force of said evidence with reference to the issues herein.

A printed copy of said record, being the case on appeal to the Court of Appeals in Amherst College *vs.* Ritch, certified by the Examiner herein, is submitted to the Court as a separate volume accompanying this testimony (see order of this Court, made May 15th, 1899, folio 63 of this volume).

1161 It is stipulated that a copy of the remittitur from the Court of Appeals, which is prefixed to the record now produced by the witness and offered in evidence, may be used in lieu of the original remittitur.

Said remittitur is printed at Vol. IV. p. 164a.

Q. (Handing paper.) Is this paper entitled "New York Supreme Court, the Trustees of Amherst College and others against Thomas G. Ritch and others," filed March 10th, 1897, purporting to be an order making the judgment of the Court of Appeals the judgment of the Supreme Court in that action, an original paper now produced by you from the files of the Clerk of the Su-
1162 preme Court of this County? A. Yes, sir.

Mr. Root.—I offer it in evidence.

It is stipulated that a copy of the paper last referred to may be used with the same force and effect as the original.

Said order is printed at Vol. IV. p. 165.

It is stipulated that the certified copies now produced of the papers annexed to the judgment roll in the action of the trustees of Amherst College and others against Thomas G. Ritch and others after the affirmance of the judgment at the Court of Appeals and now forming part of the judgment roll, being the

Referee's report, the exceptions to that report and the final judgment in the action, may be received and read in evidence with like force and effect as if the originals contained in the judgment roll now produced were received and read in evidence, with the same reservations as above stated and subject to objections to the relevancy and materiality and probative force thereof with reference to the issues herein

Mr. Root.—I offer them in evidence:

The copies were admitted in evidence and marked
1163 "Hamilton College Exhibit No. 4, November 4, 1898, C. B."

Said exhibit is printed at Vol. IV. pp. 143, 160, 167.

Mr. Root.—I offer in evidence certified copy of the proceeding on motion in the case of The Trustees of Amherst College and others against Thomas G. Ritch and others to amend the *remittitur* in the Court of Appeals.

The paper was admitted in evidence and marked "Hamilton College Exhibit No. 5, November 4, 1898, C. B."

Said exhibit is printed at Vol. IV. p. 113.

1164

It is stipulated that the printed book now produced and marked "Hamilton College Exhibit No. 6" is a copy of the brief submitted by William Blaikie, claiming to be the attorney for the executors of Lucy Fayerweather and for Mrs. Mary W. Achter and Emma S. Fayerweather, and by Edward C. James, claiming to be of counsel, upon the argument in the General Term, Supreme Court, on the appeal in the case of the Trustees of Amherst College *et al.* against Thomas G. Ritch *et al.*

Mr. Root.—I offer in evidence the first page, begin-

ning "Supreme Court," down to and including the words "Daniel B. Fayerweather, deceased." I also offer in evidence the tenth point, beginning at the middle of page 154 and ending with the words, "Received by them from such estate," on page 198. I also offer in evidence the 13th, 14th, 15th points and the conclusion from the middle of page 202 to the end of the brief.

The portions of Exhibit 6 thus offered in evidence are printed in Book of Briefs p. 1 *et seq.*

1165

It is stipulated that the printed book now produced and marked "Hamilton College Exhibit No. 7" is a copy of the brief submitted by Wm. Blaikie, claiming to be the attorney for the executors of Lucy Fayerweather and for Mrs. Mary W. Achter, Emma S. Fayerweather, and by Edward C. James, claiming to be the counsel, upon the argument in the Court of Appeals on the appeal in the case of The Trustees of Amherst College *et al.* against Thomas G. Ritch *et al.*

Mr. Root.—I offer in evidence the first page, beginning "Court of Appeals, State of New York," and I offer in evidence the tenth point from the top of page
1166 115 and going through page 121, and the conclusion, being the whole of page 185.

The portions of said exhibit thus offered in evidence are printed in Book of Briefs p. 201 *et seq.*

DANIEL O'CONNELL.

Sworn to before me.

JOHN A. SHIELDS,
Examiner.

Adjourned to November 10th, 1898, at 2 P. M.

New York, November 10th, 1898

Met pursuant to adjournment.

Present—The Examiner, Mr. Blaikie, Mr. Sherman and Mr. Hume.

On application of Mr. Hume, adjourned to November 17th, 1898, at 2 P. M.

New York, November 17th, 1898.

1167

Met pursuant to adjournment.

Present—The Examiner, Mr. Blaikie, Mr. Sherman and Mr. Hume.

On application of Mr. Hume, adjourned to November 25th, 1898, at 2 P. M.

New York, November 25th, 1898.

Met pursuant to adjournment.

Present—The Examiner, Mr. Hume and Mr. Blaikie.

On application of Mr. Hume, adjourned to December 2d, 1898, at 2 P. M.

1168

New York, December 2d, 1898.

Met pursuant to adjournment.

Present—The Examiner, Mr. Hume and Mr. Blaikie.

On application of Mr. Hume, adjourned to December 9th, 1898, at 2 P. M.

PETER J. HEINLEIN.

NEW YORK, December 9th, 1898.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. HUME and Mr. BLAIKIE.

On application of Mr. Hume, adjourned to December 16th, 1898, at 2 P. M.

1169 NEW YORK, December 16th, 1898.

Met pursuant to adjournment.

Present—The EXAMINER, Mr. HUME, Mr. SHERMAN and Mr. BLAIKIE.

PETER J. HEINLEIN, called as a witness on behalf of defendant Hamilton College, being duly sworn, testified as follows:

Direct examination by Mr. Hume:

Q. You are employed as a clerk in the County Clerk's office, New York County? A. Yes, sir; messenger.

1170 Q. These papers which I show you now are original papers produced from the files of that office, are they? A. Yes, sir.

PETER J. HEINLEIN.

Sworn to before me,

JOHN A. SHIELDS,
Examiner.

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Snpreme Court of the State of New York, taken in the case of the Trustees of Amherst College *vs.* Ritch on behalf of the defendants St. Luke's Hospital.

It will be found printed at folios 3971-3973 of the case on Appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant Exhibit No. 1, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term in the same action taken by the Trustees of Columbia College.

It will be found printed at folios 3901-3904 of the
1171 case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 2, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence notice of appeal to the General Term in the same action on behalf of the defendant Mt. Sinai Hospital.

It will be found printed at folios 3989-3995 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 3, December 16th, 1898, C. B."

1172

Mr. Hume.—I offer in evidence the notice of appeal to the General Term taken in the same action on behalf of the defendants the New York Eye and Ear Infirmary, the President and Fellows of Harvard University, Vassar College, the Trustees of Union College, the Manhattan Dispensary, the Trustees of the College of New Jersey and Barnard College.

It will be found printed at folios 3949-3965 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 4, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court taken in the same action on behalf of the defendants John B. Reynolds and Morris B. Beardsley, as executors, etc., and Mary W. Achter and Emma S. Fayerweather.

It will be found printed at folios 3883–3899 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 5, December 16th, 1898, C. B."

1173

Mr. Hume.—I offer in evidence notice of appeal to the General Term of the Supreme Court in the same action taken on behalf of the defendant the President and Fellows of Yale College.

It will be found printed at folios 3905–3919 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 6, December 16th, 1898. C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court in the same action taken on behalf of the defendant Rutgers College.

It will be found printed at folios 3905–3919 of the
1174 case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 7, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court taken in the same action on behalf of the defendant Elmira Female College.

It will be found printed at folios 4011–4024 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 8, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court in the same action taken on behalf of the defendant Shattuck School.

It will be found printed at folios 4033–4046 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 9, December 16th, 1898,
1175 C. B."

Mr. Hume.—I offer in evidence notice of appeal to the General Term of the Supreme Court in the same action taken on behalf of the defendant the Methodist Episcopal Hospital.

It will be found printed at folios 3966–3970 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 10, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court in the same
1176 action taken on behalf of the defendants the Cancer Hospital and Peter Cooper Union.

It will be found printed at folios 3997–4011 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 11, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court in the same action taken on behalf of the defendants the University of Pennsylvania and Haverford College.

It will be found printed at folios 4047-4060 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 12, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court in the same action taken on behalf of the defendant Thomas G. Ritch, individually and as executor, etc.

It will be found printed at folios 3841-3854 of the case on appeal of Amherst College *vs.* Ritch.

1177

The paper was admitted in evidence and marked "Defendant's Exhibit No. 13, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court in the same action taken on behalf of the defendant the Montefiore Home for Chronic Invalids.

It will be found printed at folios 4061-4074 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 14, December 16th, 1898,
1178 C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court in the same action taken on behalf of the defendant Henry B. Vaughan, individually and as executor, etc.

It will be found printed at folios 3869-3882 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 15, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to

the General Term of the Supreme Court in the same action taken on behalf of the defendant the University of the City of New York.

It will be found printed at folios 3919-3932 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 16, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the General Term of the Supreme Court in the same
1179 action taken on behalf of the defendant Wells College.

It will be found printed at folios 4075-4088 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 17, Dec. 16th, 1898, C. B."

Mr. Hume.—I offer in evidence notice of appeal to the General Term of the Supreme Court in the same action taken on behalf of the defendant Justus L. Bulkley, individually and as executor, etc.

It will be found printed at folios 3855-3868 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 18, December 16th
1180 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the Court of Appeals in the same action taken on behalf of the defendants John B. Reynolds and Morris B. Beardsley, as executors, etc., and the defendants, Mary W. Achter and Emma S. Fayerweather.

It will be found printed at folios 4293-4311 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 19, December 16th, 1898, C. B.

Mr. Hume.—I offer in evidence the notice of Appeal to the Court of Appeals in the same action taken on behalf of the defendant Thomas G. Ritch, individually and as executor.

It will be found printed at folios 4313–4323 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 20, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice to appeal
1181 to the Court of Appeals in the same action taken on behalf of the defendants Justus L. Bulkley and Henry B. Vaughan, executors, etc.

It will be found printed at fol. 4325–4333 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 21, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the notice of appeal to the Court of Appeals in the same action taken on behalf of the defendants Rutgers College, the University of the City of New York, the Woman's Hospital of the State of New York, Brown University, The New York Eye and Ear Infirmary, Barnard College, the President and Fel-
1182 lows of Harvard University, Vassar College, the Trustees of Union College, St. Vincent's Hospital, the Manhattan Eye and Ear Hospital, the Manhattan Dispensary the Trustees of the College of New Jersey, the Methodist Episcopal Hospital, St. Luke's Hospital, Trinity College, Mt. Sinai Hospital, the Presbyterian Hospital, the University of Pennsylvania, Haverford College, Montefiore Home for Chronic Invalids, Wells College, the President and Fellows of Yale College, New York Cancer Hospital, the Peter Cooper Union, Shattuck School and Elmira College.

It will be found printed at fols. 4334–4351 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 22, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the order of the General Term of the Supreme Court of New York, made in the case of the Trustees of Amherst College, and others *vs.* Thomas G. Ritch and others, affirming the judgment of Special Term.

It will be found printed at folios 4221–4246 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked
1183 "Defendant's Exhibit No. 23, December 16th, 1898, C. B."

Mr. Hume.—I offer in evidence the judgment of the Supreme Court of New York, entered in the case of the Trustees of Amherst College and others *vs.* Thomas G. Ritch and others, upon the order of affirmance made by the General Term of said Court.

It will be found printed at folios 4249–4290 of the case on appeal of Amherst College *vs.* Ritch.

The paper was admitted in evidence and marked "Defendant's Exhibit No. 24, December 16th, 1898, C. B."

1184

Mr. Hume.—This concludes the testimony taken in support of the plea interposed by the defendants, the Trustees of Hamilton College.

CIRCUIT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER

vs.

THOMAS G. RITCH, individually and as Trustee and Executor of the Last Will and Testa-
1185 ment of Daniel B. Fayerweather, deceased, and others.

In Equity.

UNITED STATES OF AMERICA, *Southern District of New York*, } ss.:

I, JOHN A. SHIELDS, an Examiner duly appointed by the Circuit Court of the United States for the Southern District of New York, do hereby certify that the foregoing are the proofs for final hearing taken before me in the above-entitled cause on the part of the defendant Hamilton College, under and pursuant to the 67th Rule of the Supreme Court of the United States as amended.

I do further certify that I am not of counsel nor at-
1186 torney for either of the parties, nor in any wise interested in the event of the said cause.

I further certify that Mr. Roger M. Sherman appeared on the part of complainants, and Messrs. Root, Howard, Winthrop & Stimson appeared on the part of defendant trustees of Hamilton College in the taking of said proofs.

JOHN A. SHIELDS,
As Examiner.

[10c. revenue stamp.]

Defendant's Exhibits.

The following are the exhibits offered in evidence during the foregoing testimony, except such exhibits as appear in the case on appeal to the Court of Appeals in the case of Amherst College and others *vs.* Ritch and others, which case on appeal is submitted with these proofs as a separate volume, pursuant to the following order:

1187

CIRCUIT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and another, Complainants, *against* THOMAS G. RITCH and others, Defendants.	In Equity.

1188

On the annexed affidavit of Sherman M. Granger, verified May 15th, 1899, it is

ORDERED, that the printing of the printed Case on Appeal to the New York State Court of Appeals in the case of The Trustees of Amherst College and others against Ritch and others, by this defendant The Trustees of Hamilton College, as part of the proofs of the said defendant in the issues joined on the plea and replication thereto in the above-entitled proceeding, and the service of any copies of said printed Case on Appeal to the New York State Court of Appeals, upon the solicitors for the complainants, shall be dispensed with; and it is further

ORDERED, that if the defendant the Trustees of Hamilton College submit to this Court one copy of said printed case on appeal, said printed case on appeal to the New York State Court of Appeals shall be a part of the proofs of the said defendant in the said issues, as though the same had been printed and served by said defendant, with the other parts of the proofs of the said defendants.

Dated May 15th, 1899.

E. HENRY LACOMBE,
U. S. C. J.

1189

List of Cases in Printed Case on Appeal Delivered to Examiner.

(See Stipulation, folio ~~12~~ 1158 of this volume.)

UNITED STATES CIRCUIT COURT,

SOUTHERN DISTRICT OF NEW YORK.

EMMA S. FAYERWEATHER and MARY W. ACHTER, Plaintiffs,	
1190 *against*	
THOMAS G. RITCH, individually and as Trustee and Executor of the Last Will and Testament of Daniel B. Fayerweather, deceased, and others, Defendants.	In Equity.

Upon the taking of testimony in behalf of the defendant trustees of Hamilton College under the Sixty-seventh Rule in Equity, before John A. Shields, Esq., Examiner, at the Post Office Building in the City of New York, on Novem-

ber 4th, 1898, the following stipulation was entered into between the parties herein :

"It is stipulated that the papers in the printed case on appeal in the action by the Trustees of Amherst College *et al.* against Thomas G. Ritch *et al.* in the Supreme Court of the State of New York, a list of which is now delivered to the Examiner, be received and read from the said case with like force and effect as if the originals contained in
the original judgment roll now produced from the
1191 office of the Clerk of the County of New York, and
filed in said office on December 31st, 1894, were received and read in evidence. This stipulation does not include the correctness of what purports to be the printed copy of the codicil of Daniel B. Fayerweather, dated November 15th, 1890, and does not conclude the question of the relevancy, materiality or probative force of said evidence with reference to the issues herein."

Pursuant to this stipulation the following list of papers on behalf of the defendant The Trustees of Hamilton College in the action of Trustees of Amherst College *et al.* against Thomas G. Ritch *et al.* is now delivered to said Examiner :

1192

1. Summons, beginning on page 8 of the printed case.

2. Complaint, beginning on page 11 of said case, and exhibits attached thereto.

3. Answer of Thomas G. Ritch, beginning on page 43 of said case.

4. Answer of the defendants Bulkley and Vaughan, beginning on page 53 of said case.

5. Answer of the defendants John B. Reynolds and Morris B. Beardsley as executors of the last will and codicil of Lucy Fayerweather, deceased, and also of the defendants Mary W. Achter and Emma S. Fayerweather,

beginning on page 60 of said case, and exhibits attached thereto.

6. Notice of appearance of the defendant Adelbert College of the Western Reserve University, on page 102 of said case.

7. Notice of appearance of the defendant The Methodist Episcopal Hospital in the City of Brooklyn, N. Y., on page 103 of said case.

1193

8. Notice of appearance of the defendant Anner Amelia Reynolds, on page 104 of said case.

9. Notice of appearance of the defendant Cornell University, on page 105 of said case.

10. Notice of appearance of the defendant The Union Theological Seminary in the City of New York, on page 106 of said case.

11. Notice of appearance of the defendant Marietta College, on page 107 of said case.

12. Notice of appearance of the defendant Wabash College, on page 108 of said case.

13. Notice of appearance of the defendant Maryville College, beginning on page 108 of said case.

1194

14. Notice of appearance of the defendant Park College, on page 109 of said case.

15. Notice of appearance of the defendant Bowdoin College, on page 110 of said case.

16. Notice of appearance of the defendant Lincoln University, on page 111 of said case.

17. Notice of appearance of the defendant Wesleyan University, on page 112 of said case.

18. Notice of appearance of the defendant Lafayette College, on page 113 of said case.

19. Notice of appearance of the defendant Northwestern University, on page 114 of said case.

20. Notice of appearance of the defendant The Rector and Visitors of the University of Virginia, on page 115 of said case.

21. Notice of appearance of the defendant The Trustees of Columbia College in the City of New York, on page 116 of said case.

1195

22. Notice of appearance of the defendant Elmira College, impleaded as Elmira Female College, on page 117 of said case.

23. Notice of appearance of the defendant Brown University, of Providence, R. I., on page 118 of said case.

24. Notice of appearance of the defendants Justus L. Bulkley and Henry B, Vaughan; and the Cancer Hospital and the Cooper Union, on page 119 of said case.

25. Notice of appearance of the defendant Shattuck School, on page 120 of said case.

1196

26. Notice of appearance of the defendant the Presbyterian Hospital in the City of New York, beginning on page 120 of said case.

27. Notice of appearance of the defendant The Trustees of Union College, in the Town of Schenectady, in the State of New York, beginning on page 121 of said case.

28. Notice of appearance of the defendant Manhattan Eye and Ear Hospital, on page 122.

29. Notice of appearance of the defendant The Montefiore Home for Chronic Invalids, on page 123 of said case.

30. Notice of appearance of the defendant The University of Pennsylvania, on page 124 of said case.

31. Notice of appearance of the defendant Haverford College, on page 125 of said case.

32. Notice of appearance of the defendants The President and Fellows of Harvard University, on page 126 of said case.

33. Notice of appearance of the defendant The Woman's Hospital in the State of New York, on page 127 of said case.

1197

34. Notice of appearance of the defendant Trinity College, on page 128 of said case.

35. Notice of appearance of the defendant the New York Eye and Ear Infirmary, on page 129 of said case.

36. Notice of appearance of the defendant Barnard College, on page 130 of said case.

37. Notice of appearance of the defendant The University of the City of New York, on page 131 of said case.

38. Notice of appearance of the defendant St. Luke's Hospital in the City of New York, on page 132 of said case.

39. Notice of appearance of the defendant Wells College, on page 133 of said case.

1198

40. Notice of appearance of the defendant St. Vincent's Hospital in the City of New York, on page 134 of said case.

41. Notice of appearance of the defendant Rutgers College, on page 135 of said case.

42. Notice of appearance of the defendant Princeton College, on page 136 of said case.

43. Notice of appearance of the defendant The President and Fellows of Yale College in New Haven, on page 137 of said case.

44. Notice of appearance of the defendant The Hampton Normal and Agricultural Institute, on page 138 of said case.

45. Answer of the defendant The President and Fellows of Yale College, beginning on page 139.

46. Answer of the defendant Lincoln University, beginning on page 141 of said case.

47. Answer of the defendant Barnard College, beginning on page 143 of said case.

48. Answer of the defendant The Trustees of the College of New Jersey, sued in this action as Princeton College, beginning on page 147 of said case.

1199

49. Answer of the defendant the Methodist Episcopal Hospital in the City of Brooklyn, beginning on page 150 of said case.

50. Answer of the defendant Lafayette College, beginning on page 152 of said case.

51 Answer of the defendant St. Luke's Hospital in the City of New York, beginning on page 153 of said case.

52. Answer of the defendant Trinity College, beginning on page 158 of said case.

53. Answer of the defendant Northwestern University, beginning on page 162 of said case.

54. Answer of the defendant Mt. Sinai Hospital, beginning on page 168 of said case.

1200

55. Answer of the defendant The Trustees of Rutgers College in New Jersey, sued as Rutgers College, beginning on page 170 of said case.

56. Answer of the defendant Vassar College, beginning on page 173 of said case.

57. Answer of the defendant Park College, beginning on page 177 of said case.

58. Answer of the defendant Wesleyan University, beginning on page 180 of said case.

59. Answer of the defendant Marietta College, beginning on page 181 of said case.

60. Answer of the defendant St. Vincent's Hospital in the City of New York, beginning on page 183 of said case.

61. Answer of the defendant The Trustees of Columbia College in the City of New York, beginning on page 189 of said case.

62. Answer of the defendant The President and Fellows of Harvard University, beginning on page 194
1901 of said case.

63. Answer of the defendant The President and Trustees of Bowdoin College, beginning on page 199 of said case.

64. Answer of the defendant The Rector and Visitors of the University of Virginia, beginning on page 201 of said case.

65. Answer of the defendant Cornell University, beginning on page 202 of said case.

66. Answer of the defendant Maryville College, beginning on page 204 of said case.

67. Answer of the defendant Wabash College, beginning on page 206 of said case.

1902

68. Answer of the defendant The New York Cancer Hospital, beginning on page 208 of said case.

69. Answer of the defendant Elmira College, beginning on page 212 of said case.

70. Answer of the defendant The Manhattan Dispensary in the City of New York, beginning on page 214 of said case.

71. Answer of the defendant The New York Eye and Ear Infirmary, beginning on page 217 of said case.

72. Answer of the defendant The Presbyterian Hospital, beginning on page 219 of said case.

73. Answer of the defendant The University of the City of New York, beginning on page 227 of said case.

74. Answer of the defendant The Shattuck School, beginning on page 231 of said case.

75. Answer of the defendant The Trustees of Union College, beginning on page 233 of said case.

76. Answer of the defendant The Peter Cooper Union for the Advancement of Science and Art, beginning
1203 on page 237 of said case.

77. Answer of the defendants The University of Pennsylvania and Haverford College, beginning on page 242 of said case.

78. Answer of the defendant The Woman's Hospital in the State of New York, beginning on page 244 of said case.

79. Answer of the defendant Brown University of Providence, R. I., beginning on page 248 of said case.

80. Answer of the defendant The Union Theological Seminary, in the City of New York, beginning on page 252 of said case.

1204

81. Answer of the defendant The Manhattan Eye and Ear Hospital, beginning on page 254 of said case.

82. Answer of the defendant The Montefiore Home for Chronic Invalids, beginning on page 258 of said case.

83. Answer of the defendant Wells College, beginning on page 263 of said case.

84. Decision, beginning on page 265 of said case.

85. Judgment, beginning on page 267 of said case.

86. Exceptions to the decision filed on behalf of the

defendant Thomas G. Ritch, beginning on page 910 of said case.

87. Exceptions to the decision filed on behalf of the defendant Justus L. Bulkley, beginning on page 913 of said case.

88. Exceptions to the decision filed on behalf of the defendant Henry B. Vaughan, beginning on page 916 of said case.

89. Exceptions to the decision filed on behalf of the defendants John B. Reynolds and Morris B. Beard-
1205 sley, as executors, etc., and the defendants Mary W. Achter and Emma S. Fayerweather, beginning on page 920 of said case.

90. Exceptions to the decision filed on behalf of the defendant The Trustees of Columbia College on page 924 of said case.

91. Exceptions to the decision filed on behalf of the defendants The President and Fellows of Yale College and Rutgers College, beginning on page 925 of said case.

92. Exceptions to the decision filed on behalf of the defendant The University of the City of New York, beginning on page 928 of said case.

93. Exceptions to the decision filed on behalf of the defendant The Woman's Hospital in the State of
1206 New York and others, beginning on page 932 of said case.

94. Exceptions to the decision filed on behalf of the defendant The Methodist Episcopal Hospital, beginning on page 936 of said case.

95. Exceptions to the decision filed on behalf of the defendant St. Luke's Hospital in the City of New York, beginning on page 937 of said case.

96. Exceptions to the decision filed on behalf of the defendant Trinity College, beginning on page 938 of said case.

97. Exceptions to the decision filed on behalf of the

defendant Elmira Female College, beginning on page 941 of said case.

98. Exceptions to the decision filed on behalf of the defendant The Presbyterian Hospital in the City of New York, beginning on page 945 of said case.

99. Exceptions to the decision filed on behalf of the defendant The Shattuck School, beginning on page 947 of said case.

100. Exceptions to the decision filed on behalf of the defendants The University of Pennsylvania and
1207 Haverford College, beginning on page 950 of said case.

101. Exceptions to the decision filed on behalf of the defendant The Montefiore Home for Chronic Invalids, beginning on page 954 of said case.

102. Exceptions to the decision filed on behalf of the defendant Wells College, beginning on page 957 of said case.

ROOT, HOWARD, WINTHROP & STIMSON,
Solicitors for Defendant Trustees
of Hamilton College,
32 Liberty Street,
New York City.

1208

STIPULATION.

I hereby certify that the foregoing list of papers in the printed Case on Appeal was delivered to me by the defendant The Trustees of Hamilton College on November 4th, 1898, and is the list referred to in the stipulation printed at folio 6 of said defendant's testimony taken on the issues raised by its plea and the replication thereto.

Dated May 15th, 1899.

JOHN A. SHIELDS,
Examiner.

[10c. revenue stamp.]

1209

The Remittitur of the N. Y. Court of Appeals, dated March 9th, 1897, is in Vol. IV, page 164 a.

The Order of March 10th, 1897, making the Judgment of the N. Y. Court of Appeals the Judgment of the N. Y. Supreme Court is in Vol. IV, page 165.

The Referee's report is in Vol. IV, page 143.

Exceptions to the Referee's report are in Vol. IV, page 160.

Final Judgment of the N. Y. Supreme Court is in Vol. IV, page 167.

The Remittitur Certificate of the Clerk of the N. Y. Court of Appeals is in Vol. IV, page ~~142~~ a. 632

Motion to Amend Remittitur is in Vol. IV, pages 113–142.

1210